

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1037

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

v.

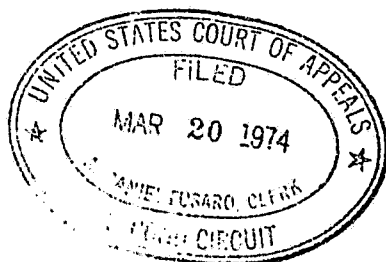
JOHN CAPRA, LEOLUCA GUARINO and STEPHEN DELLACAVA,

Defendants-Appellants.

On Appeal from Judgment of Conviction from the United States
District Court for the Southern District of New York

Appendix

(Vol. I - Pages A-1 — A-286)



BARRY IVAN SLOTNICK
Attorney for Appellant, CAPRA
15 Park Row
New York, N.Y. 10038
(212) 233-5390

GEORGE L. SANTANGELO
Attorney for Defendant, GUARINO
253 Broadway
New York, N.Y. 10007
(212) 267-4488

LAWRENCE STERN
Attorney for Appellant, DELLACAVA
343 West 29th Street
New York, N.Y. 10001
(212) 947-0537

PAGINATION AS IN ORIGINAL COPY

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CLERICAL COURT
UNITED STATES DISTRICT COURT

JUDGE FRANKEL

73 CRIM. 430

C. Form No. 100 Rev.

TITLE OF CASE		ATTORNEYS
THE UNITED STATES		For U.S.: 26h-6470
vs.		Lawrence S. Feld, AUSA
1) JOHN CAPPA, a/k/a "Hooks" all counts 2) LEOLUGA GUARINO, a/k/a "Spike" all counts 3) STEPHEN DELLACAVA, a/k/a "Leansy" all counts 4) JOHN CARUSO ct. 1 5) ROBERT JERMAIN, a/k/a "Frank" cts. 1, 2, 3, 4, 5 6) GEORGE HARRIS, a/k/a "Cincinnati" ct. 1 7) EARL SIMS ct. 1 8) ALAN MORRIS, a/k/a "Underworld" ct. 1 9) JOSEPH KESKIA ct. 1 10) JACK BROWN ct. 1 11) CARMELO GARCIA, a/k/a "Chino" ct. 1 & 6		For Defendant:

(07) STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk	10/17/73	100-100000		
J.S. 3 mailed 1, 2, 3, 5, 6, 6	Marshal	10/17/73	100-100000		
Violation	Docket fee	10/17/73	100-100000		
Title					
Sec.					
see below					
---SIX COSTS---					

DATE	PROCEEDINGS
20:7237(1) and 21:846	Conspiracy to violate narcotics laws (ct. 1)
26:4705(c) and 7237(1)	sale of heroin, 1 not in possession of written order (cts. 2 & 3)
21:812, 841(a)(1) and 841(b)(1)(A)	dist. and poss. with intent to dist. heroin, 1 (cts. 4, 5, 6)
8-16-73	Filed indictment and ordered sealed for 30 days. I/W ordered. -- Ryan, J.
8-21-73	Indictment unsealed this date in Court -- Frankel, J. case assigned to Judge Frankel as a related matter (73 CR 321)
8-21-73	JERMAIN- Filed affirmation of Leonard J. Lervenson and notice of motion for an order releasing defendant on a P.E.I. - Oct. 5-21-73 at 4:15 P.M.
8-21-73	JERMAIN- Filed affirmation of Leonard J. Lervenson in re request to release deft. on P.E.I. pending trial.

COURT OF

OVER

DATE

PROCEEDINGS

- 5-12-73 Adam Morris- Court directs entry of not guilty plea. Deft. remanded.
Guara, Guarino, Bellacava, Jormain, Morris, Rossina & Garcia - All defendants enter plea of not guilty. Bails set on 73 CR 331 carried to this indictment.
10 days for motions.
- 5-22-73 Jormain- (Atty. present) Application for reduction of bail granted. Bail previously set at \$75,000. on indictment 73 CR 331 is vacated. Bail conditions on this indictment are as set forth in Attorneys (Leonard J. Levinson) affirmation dtd. May 22, 1973 and filed on 5-22-73, which are:
Deed of the home of Jean Pericks and \$2,000. cash to be posted by Lucille Rife with the Clerk of the Court.
In addition a \$15,000. P.R.B. is to be posted which is to be co-signed by deft. and Christine Ignelzi, Carol Ann Dimperio and Paula E. Dimperio. Deft. is to report daily to the U.S. Atty. Bail limits to include Eastern District of New York. Deft. remanded. -- Frankel, J.
- 23-73 GEORGE HARRISON-Filed notice of motion for reduction of bail-Ret. 5-24-73.
- 25-73 Jarmain-Filed appearance bond #22833; in the sum \$15,000.00 dtd. 5/24/73
- 25-73 Morris-Filed copy of deft's financial affidavit.
- 5-21-73 MORRIS- Deft. produced on writ from Wayne County Jail, Detroit, Mich. Joseph I. Stone appointed counsel by court under C.J.A. No bail set. - writ adj. to June 2, 1973 -- Frankel, J.
- 5-21-73 HARRIS- (Atty. present) Application for reduction of bail granted. Bail is set at \$75,000. P.R.B. secured by \$1,000. cash and deed to home of Miss Williams. Deft. remanded in lieu of bail. The same bail conditions apply to 73 CR 392 -- Frankel, J.
- 5-25-73 SHEES- Stuart Hottelmen, Esq. appointed as counsel under C.J.A. Deft. enters plea of not guilty. Bail as set in Eastern District of Mich., \$3,000. P.R.B. sec. by \$200. continued on this indictment. -- Frankel, J.
- 5-25-73 Morris-File appointment of CJA atty Joseph I. Stone 277 Broadway.
- 5-31-73 Carmelo Garcia- Filed the following motions this date:
Filed motion to disclose electronic surveillance.
Filed motion to disclose inducement, promises and payments to prospective Government witnesses.
Filed motion for severance pursuant to Rule 14, F.R.C.P.
Filed motion to inspect Grand Jury minutes.
Filed motion for discovery and inspection.
Filed motion for bill of particulars.
Filed motion to produce evidence favorable to the defendant.
Filed motion for identification hearing.
- 4-73 Guarino-Filed affirmation and notice of motion to suppress.
- 6-73 A. MORRIS - Filed affirmation & notice of motion for a bill of particulars, discovery & inspection for a severance etc..
- Robert Jormain- Filed affirmation and notice of motion for an order modifying bail conditions as originally set on 5-24-73

Assistant

Attorney

Joe Capra
15 Northwood Circle
New Rochelle, N.Y.

Leoluca Guarino
4 Seven Oaks
Melville, L.I., N.Y.

Stephen Dellacava
2025 Continental Avenue
Bronx, N.Y.

John Caruso

Robert Jernain
6 Bonaire Drive
Dix Hills, L.I., N.Y.

George Harris
20455 Oxley Street
Detroit, Mich.
(in custody)

Earl Simms

Alan Morris
Lucasville, Penitentiary
Lucasville, Ohio

Joseph Messina
825 Lenox
Bronx, New York

Jack Brown

Amelo Garcia
1 E. 143 Street
N.Y., New York

Harry Slotnick, Esq.
15 Park Row
New York, N.Y.

George Santangelo, Esq.
253 Broadway
New York, N.Y.

Michael J. Hubble, Esq.
250 Broadway
New York, N.Y.

Lawrence K. FEITELL
1450 B.W.ay.
N.Y.C.

Harlow Gaines Hill, Esq.
209 W. 125th Street
New York, N.Y.

Edward Panzer, Esq.
299 Broadway
New York, N.Y.

John Curley, Esq.
Legal Aid Society
15 Park Row
New York, N.Y.

DATE	PROCEEDINGS
15-73	Jermain-Filed memo endorsed on defts application for modifications of defts bail conditions., Application denied. Frankel, J.
15-73	ROBERT JERMAIN-Filed memo endorsed on motion filed 1-6-73 Application denied. So Ordered--Frankel, J. <i>initial</i>
21-73	John Capra- Filed defendants memorandum of law.
20-73	Dellacava-Filed deft's memorandum of law.
20-73	ALL DEFTS.-Filed Memorandum to Counsel-Court is unable to reach motions & trial until mid-September.--Frankel, J. Mailed notices 7-23-73.
26-73	Filed Gov't Bill of Particulars.
30-73	Filed afdvt. of Gerald A. Pfeffer, AUSA DTD. 6-19-73
30-73	Filed afdvt. of Lawrence S. Feld, AUSA dtd. 6-19-73
30-73	CARMELO GARCIA -Filed memo endorsed on motion to inspect G.J. minutes..MOTION DENIED Frankel, J.
30-73	CARMELO GARCIA -Filed memo endorsed on motion to disclose electronic surveillance Motion Granted on consent. So ordered, Frankel, J.
30-73	C. GARCIA- Filed memo endorsed on motion for severance...Motion denied..Frankel, J.
30-73	Filed afdvt. of Lawrence S. Feld, AUSA dtd. 6-20-73
30-73	Filed Govt's memorandum of law
3-73	Filed CAPRA'S REPLY memorandum
30-73	Filed Memorandum..The motion for particulars by DELLACAVA and GUARINO***the Court concludes that the items to which the Govt consents supply sufficient particulars ***The foregoing embodies the court's order***No settlement is necessary.... Frankel, J.... Mailed notice...
30-73	L. CAPRA - Filed memorandum***The motion to dismiss superseding indictment is denied. Motion for discovery of grand jury minutes is denied. The motion to suppress *** denied without prejudice..The demand for discovery and a bill particulars is granted to the extent of the govts consent. Etc....Frankel, J. Mailed notice.
30-73	A. MORRIS-Filed memorandum***The Govt has consented in considerable measure to the relief sought by the motion of deft dated 6-1-73 Except in the respect hereinafter granted, the remaining items of the motion are denied...Frankel, J. M/N
30-73	Filed afdvt. of L.S. Feld, AUSA dtd. 6-19-73..
30-73	CARMELO GARCIA - Filed memo endorsed on motion filed 5-31-73..This motion contains more unceritical boiler plate than able counsel ought to permit***the govt has made discriminating judgments and consented to the proper items of discovery. Except to the extent of that consent, this motion is denied...So ordered...Frankel, J.
20-73	ALL DEFTS - Filed Govt's notice of readiness for trial.
16-73	Filed Transcript of record of proceedings, dated July 30, 1973.
19-73	LEOLUCA GUARINO - Received letter from Russell & McAlvey dtd 6-10-73 stating that they appear as counsel.

DATE	PROCEEDINGS
Aug 29-73	S. DELLACAVA - Filed notice of motion & afdvt. to suppress evidence
Sept 4-73	S. DELLACAVA - Filed stipulation that Lawrence K. Reitel, Esq of 1150 B'Way NYC is substituted as trial counsel in place of Michael L. Santangelo
Sept 5-73	S. DELLACAVA - Filed afdvt. of G.A. Peffer, AUSA dtd 9-5-73 in opposition to motion to suppress.
Sept 5-73	J. CAPRA - Filed defts Affidavit & Notice of Motion for an order dismissing the indictment or for a hearing in order to suppress all evidence seized herein or for a severance, and for such other further relief as to this Court may seem just and proper
Sept 5-73	J. Capra - Filed defts memorandum of Law.
Sept 5-73	Filed letter of Barry Ivan Slotnick dated 9-5-73.
Sept 5-73	Filed memorandum for minimization hearing****A hearing is set to commence on the morning of Sept 17, 1973 (Notice mailed)
9-6-73	S. DELLACAVA - Filed notice of motion & afdvt. to suppress evidence..
9-10-73	L. GUARINO - Filed notice of motion for an order admitting Dennis D. McAlevy, Esq. pro hoc vice as atty. for Leoluca Guarino
9-10-73	J.D. CAVA) L. GUARINO) Filed notice of motion & afdvt. to suppress evidence J. CAPRA)
9-10-73	J.D. CAVA) L. GUARINO) Filed notice of motion & afdvt. 1. declaring the 1st Count of the indictment duplicitous 2. Striking the alia; 3. Suppressing information gained as a result of the illegal arrest etc. J. CAPRA)
9-11-73	J. MESSINA - Filed afdvt. & notice of motion to suppress evidence with memo endorsed. TM This motion is denied.....Frankel, J.....m/n
9-11-73	J. MESSINA - Filed Govt's memorandum in opposition to motion to suppress.
9-13-73	C. GARCIA - Filed afdvt. of L.S. Feld, AUSA for an a Writ of Habeas Corpus
9-14-73	ALL DEFTS - Filed supplemental bill of particulars.
9-17-73	GEORGE HARRIS - Filed Second Offender Information
9-17-73	LEOLUCA GUARINO - Filed Second-Offender-Information
9-17-73	ALAN MORRIS - Filed Second Offender Information
9-17-73	STEPHEN DELLACAVA - Filed Second offender Information
9-17-73	STEPHEN DELLACAVA - Second Offender Information under indictment C123-164
9-17-73	STEPHEN DELLACAVA - Filed Information - C123-165
9-18-73	J. CAPRA - Filed memo endorsed on motion filed 9-10-73...Motion granted. So ordered Frankel, J.

Cont'd. on page 5

DATE	PROCEEDINGS
9-13-73	ROBERT JERMAIN - Filed notice of motion for an order severing the defts. pursuant to Rule 1.
9-13-73	ROBERT JERMAIN - Filed defts. memo of law.
9-20-73	ALAN MORRIS - Filed notice of motion to suppress.
9-20-73	STEVEN DELLACAVA) JOHN CAPRA) Filed afdvt's of both defts dtd. 9-20-73.
9-21-73	ALAN MORRIS - Filed Order To Show Cause re: criminal contempt on 10-1-73. Frankel, J.
9-24-73	STEPHEN DELLACAVA, et al. - Filed deft. Dellacava's memo of law regarding Suppression of the April 13-73 Search Product.
9-20-73	ROBERT JERMAIN motion for severance, and memo-endorsed - Upon further consideration as a result of this motion, I have concluded that the statement giving rise to the motion will be excluded. Hence, while it has served an obviously useful purpose, the motion is no longer necessary. It is accordingly denied. So Ordered, Frankel, J. (m/n)
9-24-73	Earl Silvers - Filed defendants financial afdvt.
9-26-73	ROBERT BALPIS - Filed GJA copy #5 appointment of David Blackstone, Esq., 335 F'way, NYC as counsel for defendant - Frankel, J.
9-29-73	STEVEN DELLACAVA - Filed afdvt & notice of motion for an order suppressing certain statements of the deft.
9-17-73	Minimization hearing commenced
9-18-73	Cont'd. Deft Garcias's bail exonerated. Bail in the amount of \$5,000 cash or surety bond set by the court... Remanded.
9-19-73	Hearing cont'd.
9-20-73	Hearing cont'd.
9-21-73	Hearing cont'd.
9-22-73	Hearing cont'd.
9-23-73	Hearing cont'd.
9-24-73	Hearing cont'd. and adj'd to Oct. 2, 1973
9-25-73	Hearing cont'd & concluded - Decision reserved.
9-26-73	Filed memo endorsed on order to show cause dtd 9-24-73. The matter is adj'd to 10:30 a.m. 10-11-73 and trial will be held at that time. So ordered. Griesa, J.
9-27-73	Filed memorandum for counsel: ***A memorandum relating to the automobile search will be filed in the next day or so*** Frankel, J.
9-28-73	ROBERT JERMAIN - Filed afdvt. of G.A. Feffer, AUSA dtd. 10-18-73 for a writ of H/C
9-29-73	Filed supplemental bill of particulars.

DATE	PROCEEDINGS
10-23-73	MARK STINE - Filed CJA appointment of Stuart Holtzman Esq. 233 B'Way NYC 10007
10-29-73	J. CAPRA - Filed CJA authorization of 10 Dist. Court R. porters
10-29-73	A. JACOBIN - Filed CJA authorization of 10 Dist. Court R. porters
10-31-73	Filed Govt's exhibit 3525A Ordered sealed and to be placed with the clerk in his vault in cashiers office....Frankel, J.

10-18-73	J. CAPRA) L. GUARINO) S. DELLACAVA) - JURY TRIAL BEGUN Defts SINFEL, MISCILLA and GARCIA severed from R. JERMAINE) trial, upon Govt's motion. Count 6 is dismissed as to all depts G. HARRIS) A. MORRIS)
10-19-73	Trial cont'd.
10-23-73	Trial cont'd.
10-24-73	Trial cont'd.
10-25-73	Trial cont'd.
10-26-73	Trial cont'd.
10-27-73	Trial cont'd.
10-30-73	Trial cont'd.
10-31-73	Trial cont'd.
11-1-73	Filed one envelope Govt. Exhibit 3532A ordered sealed and placed in vault...Frankel...
11-9-73	Filed Court exhibit 1 ordered sealed and placed in vault....Frankel, J.
11-9-73	Filed order that U.S. Marshal deliver Herbert Sperling before Judge Frankel on Nov. 13-73....Frankel, J. Mailed notice
11-12-73	Filed affdvt. of D. McAlevy in support of writ of habeas corpus.
11-14-73	Filed affirmation of L.J. Levenson in support of a writ.
11-15-73	Filed order that U.S. Marshal deliver Thomas Lentini before Judge Frankel on 11-15-73
11-15-73	GEORGE HARRIS - Filed affdvt. of L.S. Feld, AUSA in support of a Writ of H/C
11-1-73	TRIAL Cont'd.
11-2-73	Trial Cont'd.
11-5-73	Trial Cont'd.
11-7-73	Trial Cont'd.
11-8-73	Trial Cont'd.
11-9-73	Trial Cont'd.
11-13-73	Trial cont'd. Govt. Rest.
11-14-73	Trial cont'd.
11-15-73	Trial cont'd.
11-16-73	Trial cont'd.
11-19-73	Trial cont'd. Jury starts deliberation
11-20-73	Trial cont'd. Jury resumes deliberation
11-21-73	Trial cont'd. Jury returns verdict as follows:---CAPRA, GUARINO, DELLACAVA and JERMAINE found GUILTY on all counts 1, 2, 3 & 4 & cont'd. on present bail condition until 10 a.m. Nov. 23, 1973 at which time they are to surrender to U.S. Marshal in the Court...DEFTS HARRIS & MORRIS found guilty on Count 1. P.S.I. ordered on all depts Sent. date is Jan. 3, 1974...Frankel, J.

110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	FILED
11-27-73	DELLA CAVA - Filed opinion #40047 The motion to suppress is denied...So Ordered. Frankel, J.... Mailed notice.	
11-23-73	JOHN CAPRA) STEVEN DELLA CAVA) LEOLUCA GUARINO) ROBERT JERMAIN) Deft's surrendered to custody of U.S. Marshal pending sentence.	
2-4-73	Filed opinion # 40082 ***examining the conduct of the legal and police officials following Dec. 12, 59 the court concludes that it was reasonable and outlary is not warranted.***the motion to suppress evidence from the Diane's Bar interceptions was denied....Frankel, J.	
12-5-73	Filed opinion #40093 Supplementing the court's memorandum of Nov. 27-73**Having in mind the familiar rule that an agency's transgression of its own regulations may constitute a deprivation of due process***FRANKEL, J. /copy of	
12-18-73	Filed letter dated 12-17-73 to Judge Marvin E. Frankel from Paul J. Curran, U.S. Atty. with memorandums attached.	
12-26-73	Filed Mailed original. CJA copy 1 to the A.O. Wash. D.C. for payment of Reporters Frankel, J.	
12-27-73	Filed memorandum opinion #40150 ***as the motion in this case was originally presented upon affidvts, the claim of a possessory interest by the movants J. Capra, L. Guarino and S. Della Cava was in general and conclusory terms**** This was not an intrusion initiated by law enforcement officers with the specific intent of discovering evidence of a crime. In short the court would sustain this as an essentially private search and a lawful seizure under authorities not always perfectly harmonious but sufficient in their net effect to validate what was done here.....Frankel, J.....Mailed notice to atty's.	
1-3-74	L. GUARINO - Filed affdvt. of deft. in response to the information filed by the Govt. pursuant to 21 U.S.C. Sec. 851	
1-3-74	JOHN CAPRA - Filed Judgment (# 74, 0833) Atty. Barry I. Slotnick, present. The deft is committed for a period of FIFTEEN (15) YEARS on each of counts 1, 2, 3, and 5 to run concurrently with each other. THREE (3) YEARS on count 4 to run consecutively with sentence imposed on counts 1, 2, 3 and 5. On counts 1, 4, and 5, pursuant to the provisions of Section 841 of Ti. 21, U.S. Code, deft is placed on Special Parole for a period of SIX (6) YEARS in addition to said term of imprisonment....Deft is fined \$25,000 on count 1 and \$20,000 on count 2. Total fine \$45,000....The Court recommends that the deft be confined at Federal Detention Center, West St., N.Y., pending appeal if overtaxed facilities make that possible.....FRANKEL, J.....Docketed 1-7-74 NO BAIL SET. REMANDED.	
	(SEE-PAGE 8)	

DATE	PROCEEDINGS
3-74	<p>LEOLUCA GUARINO-Filed Judgment (#17057) Atty. Dennis D.S. McAlevy present. The deft is committed for imprisonment for a period of FIFTEEN (15) YEARS on each of counts 1,2,3, and 5 to run concurrently with each other. THREE (3) YEARS on count 4 to run consecutively with sentence imposed on counts 1,2,3 and 5. On counts 1,4 and 5, pursuant to the provisions of Section 841 of Ti.21, U.S.Code, deft is placed on SPECIAL PAROLE for a period of SIX (6) YEARS in addition to said term of imprisonment. Deft is fined \$25,000 on count 1 and \$20,000 on count 2. Total fine \$45,000.. The Court recommends that the deft be confined at Federal Detention Center, West., N.Y. pending appeal if overtaxed facilities make that possible. NO BAIL. REMANDED. FRANKEL, J.....Docketed 1-7-74....</p>
1-3-74	<p>STEPHEN DELLACAVA- Filed Judgment. Atty. Lawrence Feltoll, present. The deft is committed for imprisonment for a period of FIFTEEN (15) YEARS on each counts 1,2,3, 4, and 5 to run concurrently with each other. On counts 1,4 and 5, pursuant to the provisions of Section 841 of Ti. 21 U.S.CODE deft. is placed on Special PAROLE for a period of SIX (6) YEARS IN ADDITION TO said term of imprisonment. Court recommends that the deft be confined at Federal Detention Center, West Street, New York, N.Y. pending appeal if overtaxed facilities make that possible. FRANKEL, J..... DOCKETED 1-7-74 No bail. Remanded.</p>
1-3-74	<p>ROBERT JENNAIN-Filed Judgment (Atty. Leonard J. Levenson, present) The deft is committed for imprisonment for a period of TWELVE (12) YEARS on each of counts 1,2,3,4 and 5 to run concurrently with each other. On counts 1, 4 and 5, pursuant to the provisions of Section 841 of Ti. 21, U.S. Code, deft is placed on Special Parole for a period of SIX (6) YEARS in addition to said term of imprisonment...The Court recommends that the deft. be confined at Federal Detention Center, West St. N.Y., pending appeal if overtaxed facilities make that possible.....FRANKEL, J.....docketed 1-7-74 Deft is remanded.....</p>
1-3-74	<p>ALAN MORRIS- FILED JUDGMENT. ATTY. JOSEPH I. STONE, PRESENT. The deft is committed for imprisonment, for a period of EIGHT (8) YEARS. Sentence to run conc with the sentence imposed in the U.S.D.C. EAST DIST OF MICHIGAN on 8-15-73, Docket #15683 The Court recommends that the deft be confined at Federal Detention Center, West Street, New York, N.Y. pending appeal if overtaxed facilities make that possible; Frankel, Docketed: 1-7-74 Deft is Remanded....</p>
1-8-74	<p>Filed memorandum ex #10185 on pretrial publicity...The events leading to the trial in this case included actions by law enforcement officers resulting in massive and lurid publicity for their activities...Defts have moved to dismiss the indictment or have convictions set aside...This court subject to wiser opinions from above deems such relief excessive and unjustifiable,*****Frankel, J...</p>
1-9-74	<p>ALAN MORRIS - Filed notice of appeal..Mailed copy to Alan Morris Fed. Detention Headquarters 427 West St. NYC & U.S. Atty. S.D.N.Y. Joseph I. Stone, Esq. 277 B'Way NYC.....Appeal allowed in forma pauperis...Frankel, J. Entered on Docket 1-9-74..</p>
1-9-74	<p>ROBERT JENNAIN - Filed notice of appeal..Mailed copy to Leonard J. Levenson, Esq. 11 Park Pl. NYC & U.S. Atty. S.D.N.Y.....Leave to appeal in forma pauperis granted on 1-8-74..Frankel, J. Entered on docket 1-9-74</p>

DATE	PROCEEDINGS
1-10-74	STEPHEN DELLACAVA - Filed notice of appeal from judgment of 1-3-74. Copies to U.S. Atty. & Stephen Dellacava 427 West. St. NYC Ent. on docket 1-10-74..
1-11-74	LEOLUCA GUARINO - Filed notice of appeal from judgment of 1-3-74. Copies to U.S. Atty. & Deft at Fed. Detention Headquarters West. St. N.Y. Ent. on docket 1-11-74..
1-11-74	JOHN CAPRA - Filed notice of appeal from judgment of 1-3-74. Copies to U.S. Atty. & Deft J. Capra 15 Northwood Circle New Rochelle, N.Y. Ent. on docket 1-11-74....
1-11-74	Filed Govt's memorandum of law in opposition to motions of CAPRA, GUARINO and DELLACAVA.
1-14-74	Filed deft's memorandum on motion to suppress the Toledo Search Product
1-14-74	Filed Govt's memorandum of law in opposition to motion to suppress.
1-14-74	GEORGE HARRIS - Filed notice of appeal from final judgment. Mailed copies to U.S. Atty. G. Harris Fed. House of Detention NYC D. Blackstone 335 R'way NYC.... Memo endorsed Leave to file notice of appeal in forma pauperis is granted.... Frankel, J. Ent. on docket 1-14-74...
1-11-74	GEORGE HARRIS - Filed Judgment (David Blackstone, atty. present) the deft is committed for imprisonment for a period of THIRTEEN YEARS. Sentence to run concurrently with sentence imposed under indictment 73Cr. 392.... Pursuant to the provisions of Section 841 of Ti. 21, U.S.C., deft is placed on Special Parole for a period of FIVE YEARS in addition to said term of imprisonment.... Remanded. Frankel, J. docketed 1-15-74.....
1-15-74	Filed memorandum... In the judgments in this case, the court apprised of the proposed appeals and urged to make consultation with counsel as convenient as possible... The Court will not go beyond the suggestion**** Frankel, J. m/n
1-16-74	S. D. CAVA Filed remand dated 11-23-73
1-16-74	R. JERMAIN Filed remand dated 11-23-73
1-16-74	J. CAPRA Filed remand dated 11-23-73
1-16-74	L. GUARINO Filed remand dated 11-23-73
1-16-74	L. GUARINO Filed commitment & entered return, Deft delivered to F.D.H. ON 1-3-
1-16-74	J. CAPRA Filed commitment & entered return, Deft delivered to F.D.H. ON 1-3-
1-16-74	R. JERMAIN Filed commitment & entered return, Deft delivered to F.D.H. ON 1-3-
1-16-74	S. DELLACAVA Filed commitment & entered return, Deft delivered to F.D.H. ON 1-3-
1-24-74	Filed transcript of record of proceedings, dated 04-16, 19, 23, 24, 25, 1973
1-24-74	Filed transcript of record of proceedings, dated 04-26, 29, 30, 31, 1973
1-24-74	Filed transcript of record of proceedings, dated Nov. 8, 9, 13, 1973
1-24-74	Filed transcript of record of proceedings, dated Nov. 14, 15, 16, 1973
1-24-74	Filed transcript of record of proceedings, dated Nov. 19, 20, 21, 1973
1-24-74	Filed transcript of record of proceedings, dated Nov. 1, 2, 5, 7, 1973
1-24-74	Filed transcript of record of proceedings, dated 1-3-74

DATE	PROCEEDINGS
1-30-73	Filed Letter to Judge Finkel dated Dec. 12, 73 from the US Atty. Field.
1-30-74	Filed Letter to Judge Frankel dated Dec. 17, 1973 From US Atty Paul Cullen.
1-30-74	Filed Letter to Judge Frankel dated Dec 21, 73, from L.K. Teitel, Esq.
1-30-74	Filed Letter to Judge Frankel dated Dec. 24, 1973 from B.T. Slotnick.

A TRUE COPY

RAYMOND P. BURGHARDT, Clerk

By H. J. [Signature]
Deputy Clerk

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INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

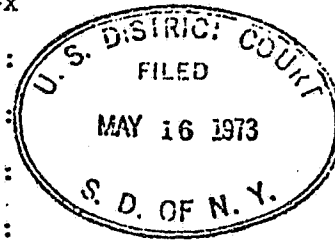
73 CRIM. 480

UNITED STATES OF AMERICA,

-v-

JOHN CAPRA, a/k/a "Hooks",
LEOLUCA GUARINO, a/k/a "Spike",
STEPHEN DELLACAVA, a/k/a "Beansy",
JOHN CARUSO,
ROBERT JERMAIN, a/k/a "Frank",
GEORGE HARRIS, a/k/a "Cincinnati",
EARL SIMMS,
ALAN MORRIS, a/k/a "Underworld",
JOSEPH MESSINA,
JACK BROWN and CARMELO GARCIA,
a/k/a "Chino",

Defendants.



INDICTMENT

S 73 Cr.

The Grand Jury charges:

1. From on or about the 1st day of July, 1969 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, and elsewhere JOHN CAPRA, a/k/a "Hooks", LEOLUCA GUARINO, a/k/a "Spike", STEPHEN DELLACAVA, a/k/a "Beansy", JOHN CARUSO, ROBERT JERMAIN, a/k/a "Frank", GEORGE HARRIS, a/k/a "Cincinnati", EARL SIMMS, ALAN MORRIS, a/k/a "Underworld", JOSEPH MESSINA, JACK BROWN and CARMELO GARCIA, a/k/a "Chino", the defendants, and Herbert Sperling, Willie Middlebrook, Harold Mc Spadden, Joseph Conforti, Jack Spada, Joaquin Ramos, a/k/a "Gino", Horace Stanley Marabel, Jimmy Rosa and Louis Oliveras, named herein as co-conspirators and not as defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 4705(a) and 7237(b) of Title 26, United States Code, and Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully, intentionally and knowingly would sell, barter, exchange and give away narcotic drugs, the exact amount thereof being to the Grand Jury unknown, not in pursuance of a written order of the person or persons to whom such narcotic drugs were sold, bartered, exchanged and given away on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate, contrary to law, in violation of Sections 4705(a) and 7237(b), Title 26, United States Code.

3. It was further part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

1. On or about November 5, 1970, defendants ROBERT JERMAIN, a/k/a "Frank", EARL SIMMS, GEORGE HARRIS, a/k/a "Cincinnati" and co-conspirator Joaquin Ramos met at Tom's Villabianca Restaurant, Bronx, New York.

2. On or about November 5, 1970, co-conspirator Joaquin Ramos met in the Bronx, New York with defendant STEPHEN DELLACAVA, a/k/a "Beansy" and negotiated for the sale of a quantity of heroin.

3. In or about May, 1971, co-conspirator Joaquin Ramos met with defendants JOHN CAPRA, a/k/a "Hooks", and LEOLUCA GUARINO, a/k/a "Spike".

4. In or about October, 1971, co-conspirator Joaquin Ramos had a discussion with defendants JOHN CAPRA, a/k/a "Hooks", LEOLUCA GUARINO, a/k/a "Spike", and STEPHEN DELLACAVA, a/k/a "Beansy" concerning the sale of six kilograms of heroin and one kilogram of cocaine.

5. In or about September, 1971, defendant ALAN MORRIS, a/k/a "Underworld", and co-conspirator Willie Middlebrook brought approximately \$150,000 in United States Currency to the Lincoln Motor Inn, New York, New York.

6. On or about January 17, 1972, co-conspirator Louis Oliveras had a conversation with defendant LEOLUCA GUARINO, a/k/a "Spike" concerning the sale of one half kilogram of heroin.

7. In or about March, 1973, defendants JOHN CAPRA, a/k/a "Hooks", LEOLUCA GUARINO, a/k/a "Spike", JOHN CARUSO and co-conspirators Herbert Sperling, Jack Spada and Joseph Conforti went to the vicinity of the Stage Delicatessen, 7th Avenue and 54th Street, New York, New York.

8. In or about April, 1973, defendant JOHN CARUSO transported approximately six kilograms of heroin to a motel on Long Island, New York.

(Title 26, United States Code, Section 7237(b) and Title 21, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

In or about the month of August, 1970, in the Southern District of New York, JOHN CAPRA, a/k/a "Hooks", LEOLUCA CUARINO, a/k/a "Spike", STEPHEN DELLACAVA, a/k/a "Beansy" and ROBERT JERMAIN, a/k/a "Frank", the defendants, and co-conspirator Joaquin Ramos, a/k/a "Gino", unlawfully, wilfully and knowingly did sell, barter, exchange and give away to Alan Morris, a/k/a "Underworld", approximately two kilograms of heroin, a narcotic drug, in that the said sale, barter, exchange and giving away was not in pursuance of a written order of the said Alan Morris, a/k/a "Underworld", on a form issued in blank for that purpose by the Secretary of the Treasury of the United States or his delegate.

(Title 26, Sections 4705(a) and 7237(b), United States Code; Title 18, United States Code, Section 2).

COUNT THREE

The Grand Jury further charges:

On or about the 6th day of November, 1970, in the Southern District of New York, JOHN CAPRA, a/k/a "Hooks", LEOLUCA GUARINO, a/k/a "Spike", STEPHEN DELLACAVA, a/k/a "Beansy" and ROBERT JERMAIN, a/k/a "Frank", the defendants, unlawfully, wilfully and knowingly did sell, barter, exchange and give away to George Harris, a/k/a "Cincinnati" approximately one kilogram of heroin, a narcotic drug, in that the said sale, barter, exchange and giving away was not in pursuance of a written order of the said George Harris, a/k/a "Cincinnati" on a form issued in blank for that purpose by the

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Secretary of the Treasury of the United States or his delegate.

(Title 26, United States Code, Sections 4705(a) and 7237(b); Title 18, United States Code, Section 2).

COUNT FOUR

The Grand Jury further charges:

In or about the month of October, 1971, in the Southern District of New York, JOHN CAPRA, a/k/a "Hooks", LEOLUCA GUARINO, a/k/a "Spike", STEPHEN DELLACAVA, a/k/a "Beansy" and ROBERT JERMAIN, a/k/a "Frank", the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately five and one-half kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

COUNT FIVE

The Grand Jury further charges:

In or about the month of October, 1971, in the Southern District of New York, JOHN CAPRA, a/k/a "Hooks", LEOLUCA GUARINO, a/k/a "Spike", STEPHEN DELLACAVA, a/k/a "Beansy" and ROBERT JERMAIN, a/k/a "Frank", the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

COUNT SIX

The Grand Jury further charges:

On or about the 17th day of January, 1972, in the Southern District of New York, JOHN CAPRA, a/k/a "Hooks", LEOLUCA GUARINO, a/k/a "Spike", STEPHEN DELLACAVA, a/k/a "Beansy", and CARMELO GARCIA, a/k/a "Chino, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-half kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

Richard E. ...
Foreman

Whitney North Seymour, Jr.
WHITNEY NORTH SEYMOUR, JR.
United States Attorney

ALL IN 20
JAN 23 1972
A TRUE COPY
RAYMOND F. BURCHARDT, Clerk
By B. Edwards
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

-against-

JOHN CAPRA,

NOTICE OF MOTION

73 CR 460

Defendant.
-----X

S I R :

PLEASE TAKE NOTICE, that upon the duly verified affidavits of BARRY IVAN SLOTNICK, ESQ. and JOHN CAPRA annexed hereto and made a part hereof, together with the memorandum of law submitted herewith, and upon all of the other papers, proceedings and applications had herein, the undersigned will move this Court at the United States District Court House located at Foley Square, New York, New York, before The Honorable Marvin E. Frankel, a Judge of the United States District Court in and for the Southern District of New York, for an order:

A. Dismissing the indictment, or, in the alternative,

B. For a hearing in order to suppress all evidence seized herein - as more fully explained in the attached affidavits and memorandum of law - together with all moving papers and memoranda of all other counsel - upon the grounds that the defendant was deprived of his constitutional rights and upon each and every other ground as detailed in the attached papers, or, in the alternative,

C. For a severance, and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
September 5, 1973

TO: HONORABLE PAUL CURRAN
United States Attorney

Yours, etc.,

BARRY IVAN SLOTNICK
Attorney for Defendant
15 Park Row
New York, New York 10038
(212) 233-5390

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

Indictment No.
73 CR460

-against-

AFFIDAVIT

JOHN CAPRA,

Defendant.

-----X

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

BARRY IVAN SLOTNICK, being duly sworn, upon information and belief, deposes and says:

That I have been retained to represent the above named defendant JOHN CAPRA and place this affidavit before the Court on behalf of the defendant Capra's motion for (a) dismissal of the indictment herein; (b) a hearing in which the Court will order suppression of all evidence resulting from the official illegality alleged herein; and (c) for such other and further relief as to this Court may seem just and proper.

I.

THE ENTIRE CASE OF THE GOVERNMENT
IS TAINTED BY THE PRIMARY ILLEGALITY
AS A RESULT OF THE UNAUTHORIZED ABUSE
OF A WIRETAP ORDER DATED DECEMBER 8,
1971.

On December 8, 1971, the New York County District Attorney's Office applied for an eavesdropping warrant "In the Matter of the Interception of Telephonic Communications of Joseph Della Valle with¹ co-conspirators, accomplices and agents

1. The remainder of the caption of the order indicates that Mr. Della Valle's home, located at 1475 Theriot Avenue in The Bronx was also to be tapped during the same period of time.

over telephones bearing the numbers 722-9595 ... located at 2034 Second Avenue, New York, New York ..." [emphasis added].

The decretal paragraphs of this order² specifically enumerate that only the conversations "of Joseph Della Valle" were to be electronically intercepted by the police.³

The captions of defendant's Exhibit "A" attached hereto indicate that only the conversations of Joseph Della Valle with others were to be intercepted. Indeed, the Court, on December 8, 1971, complied with that request and ordered that only the conversations "of Joseph Della Valle" were to be intercepted.

The affidavits submitted requesting the aforementioned eavesdropping warrant all contain information relative to one Joseph Della Valle with an allegation that he was speaking over telephone number 722-9595 (and telephone number 824-6406) for the purpose of narcotics transactions. The affidavits detail much about Mr. Della Valle and do not at any point mention the defendant Capra or even allude to him.⁴

2. The order, warrant and the affidavits with reference to the above tap of "Diane's Bar" are submitted and attached hereto as the defendant's Exhibit "A" in order to allow the Court a full reading of said application.

3. The order further contains a minimization paragraph, does not provide for proper inventory, does not provide for notice - which was never given to the defendant Capra and is improper in other aspects which will be discussed in Points II and III - if the Court deems it necessary to go further and delve into those issues.

4. Detective Eaton indicates in Paragraph 34 of his affidavit that he has been conducting an investigation of Joseph Della Valle for over a two month period. He indicates that his observations have allowed him to surveil and observe individuals associated with Joseph Della Valle. - Capra is not one of them.

On December 9, 1971, armed with the eavesdropping warrant, the police commence tapping the telephone at Diane's Bar (2034 Second Avenue - phone number 722-9595). The police officers establish a method of operation whereby they listen to almost each and every conversation occurring over telephone number 722-9595.⁵ Contrary to the Court order, the defendant Capra was overheard on three occasions in conversation with Steve "Beansie" Dellacava.⁶

Thus, we see that on the three occasions that the police recorded John Capra, he was speaking to (as the logs indicate) "Steve" - "Beansie" - "Steve" - there is no allusion, contention nor even conjecture that he was involved in conversations with the subject party of the wiretap - and the only person to have been listened to - Joseph Della Valle.

5. As verified, the logs of that telephone tap indicate that approximately 2,000 conversations were overheard in contravention of the Court order.

6. (a) December 15, 1971 at 18:46, the logs indicate that "Steve" called "John" and the conversation is "n.p." - (non-pertinent). This conversation appears at Reel No. A-2242; (b) The second Capra conversation not authorized to be overheard appears on December 23, 1971 at 18:13 in which "Beansie" calls Capra from the Diane's Bar. This conversation is marked "e.p." - which we may assume is extra-pertinent and bears an asterisk. This conversation appears on Reel No. 6-A; and (c) On December 29, 1971, in an abuse of the provisions of the eavesdropping warrant at 20:25, the logs indicate that "Steve" received a call from an unknown male which is non-pertinent (this unknown male is John Capra) - This conversation is also totally overheard, transcribed and logged.

It is interesting to note that the police make transcripts of these conversations - which they were not to have listened to at the beginning. (Attached hereto as Exhibit "B").

With regard to these conversations, they are completely the result of an "unauthorized interception" and the Government cannot even argue that there was an attempt at minimization.

Specifically, the conversation of December 15, 1971, a call was made from Steve to John at 914-576-0398.⁷ The police knew this was not the home of Joseph Della Valle as they had his proper home telephone number. They knew he was not married and they knew he had no children. We emphasize the aforementioned due to the fact that the beginning of the phone conversation is answered by a child who was asked by Steve, "Hello, is your daddy in?" After the party is placed on the telephone, Steve says, "Hello, John". This conversation is marked non-pertinent ("n.p.") on the logs, yet it is listened to in full, transcribed and Joseph Della Valle is obviously not a party. On December 23, 1971, the police again intrude and the second conversation between "Beansie" and John Capra is intercepted, listened to, transcribed and acted upon.

It is once again reiterated that nowhere, within the four corners of any page of the application for the telephonic eavesdropping wire on telephone no. 722-9595 (hereinafter called Diane's Bar No. 1 Warrant - Exhibit "A"), is there any indication that the defendant Capra is an associate of, involved with or even knows Joseph Della Valle - Indeed, throughout all of the

7. The police immediately would know the number called as a Pen Register was in use.

wiretaps⁸ and all of the affidavits there is no relationship shown between Capra and Joseph Della Valle - not that that would justify the unlawful and unauthorized intrusion.

There can be no question that the police had no right to listen to a conversation not with or to Joseph Della Valle.

However, as a result of the illegal overhears of December 23, 1971, the police learned that there was an individual by the name of John Capra (as fully detailed in the affidavit of Detective Eaton, dated January 6, 1972 attached hereto as Exhibit "C"), follow "Beansie" and observed what to them was a narcotics transaction. There can be no question that as a result of the December 23, 1971 illegal overhearing of John Capra, the police commenced an investigation into the activities of John Capra and "Beansie" (also known as Steve Dellacava) and this investigation commenced.

As a result of the illegal overheard of December 23, 1971, the police followed Beansie to RAY'S STATIONERY STORE⁹. The conversation of December 23, 1971 commences with Steve calling 822-9005 (RAY'S STATIONERY) and asking for "Johnny Hooks ... next door." A woman asked Steve to hold on and goes to get the

8. As has been revealed to Your Honor, during the pre-trial conference, this matter involves hundreds of hours of wiretapping and eavesdropping including some 31 orders of various state courts allowing the New York City Police Department to either wiretap or eavesdrop certain individuals and telephones.

9. A subsequent subject of a wiretap order (telephone number 822-9005), all based on the original Diane's Bar tap (Exhibits "A" and "C").

defendant Capra. The police full well realize that at no time is Della Valle known as Johnny Hooks, but they continue on the telephone and listen. The defendant Capra comes to the telephone, has extensive conversation with "Beansie", all recorded, logged and transcribed. The conversation continues to a point where, if the police were to have followed the original Court order, they would not have continued to listen. - As there was no question that Joseph Della Valle was not a party with or to that telephone conversation, In the letter of the Court order, they should have left the conversation, but nevertheless they continued to listen until they illegally obtain the following interception:

"From Beansie to the defendant Capra: Do I bring anything? You, like gotta 'present' for them people?"

Capra responds: Yeah.

"Beansie" - You want me to pick it up there, or what?

Capra - Yeah."

Based upon that conversation, the police (a) follow "Beansie" to RAY'S STATIONERY STORE; (b) observe him take a "package" from the trunk of what is alleged to be Capra's automobile; and (c) commence an investigation into John Capra - all this accomplished as a result of the initial lead furnished by the unauthorized "ear" to the telephone call of December 23, 1971.

On December 29, 1971, a conversation is again recorded between Steve and unknown male which is marked "Non-Pertinent"

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in the logs (found at Reel 7-A) - nevertheless, this non-pertinent conversation is recorded and the transcript has pencilled in that this is a conversation of John Capra. There can be no question, as reaffirmed by all of Eaton's affidavits and applications relevant hereto, that the identity of John Capra, together with his association with Steven Dellacava, was learned as a result of the illegal overhearing of their conversation of December 23, 1971.¹⁰

A hearing will prove conclusively to this Court that the initial identification of John Capra, the commencement of this investigation and his ultimate indictment was the result of the primary illegal overheard on the Diane's Bar telephone on December 23, 1971 (see Exhibit "B").

The affidavit of Detective George Eaton, in an order to obtain the extension for another 30 days for telephone number 722-9595 (Diane's Bar extension - Exhibit "C"), relates almost in full the illegally overheard conversation of December 15, (Pages 4-5 of Detective Eaton's affidavit).¹¹

In Paragraph 13, Detective Eaton details the crucial conversation between the defendant Capra and "Beansie" - the man whose voice he recognizes as ultimately belonging to Steven Dellacava.

10. The affidavits and extensions for the RAY'S STATIONERY tap are attached hereto as Exhibit "D". The applications for the Steve's Air Conditioning tap are attached hereto as Exhibit "E". The applications for the "bug" on 1023 Havemeyer Street are attached hereto as Exhibit "F" and the "Whitestone bug" is attached hereto as Exhibit "G".

11. It is interesting to note that the police indicate that the "Stevie" is a voice of an unknown male which is one overheard in other illegal overhears (Paragraphs 6 and 7 of the affidavit attached hereto as Exhibit "C") and that they ultimately conclude that Stevie is, in fact, Steven Dellacava.

Detective Eaton, in further paragraphs of the affidavit for the extension of the telephone tap at the Diane's Bar (Exhibit "C") details how, as a result of that illegal overheard, he follows Steven Dellacava to 3203 Westchester Avenue - the Beach Rose Social Club - (the subsequent object of a bug which does not concern the defendant Capra). Eaton discovers that right next door to the Beach Rose Social Club is Ray's Stationery Store, the telephone bearing number 822-9005, to which Steven Dellacava called the defendant Capra. As a result of the original illegal overheard, Detective Eaton maintains the surveillance and observes Dellacava enter the premises of 3203 Westchester Avenue and depart and walk to a dark Lincoln Continental.¹²

The detective continues his surveillance of Della Cava and ultimately comes to the opinion that he is part of a narcotics conspiracy with John Capra. (See Eaton's affidavits attached hereto as Exhibits "C", "D", "E", "F" and "G") - a full reading of which will show conclusively that unless and until the illegal overheard of December 23, 1971 occurred, there was no knowledge of John Capra or his relationship with Steven Dellacava. The taint flows and the investigation continues. John Capra's identity, relationship and whereabouts have been determined as a result of the illegal overheard of December 23, 1971, (see Eaton's affidavits attached hereto as Exhibits "A" and "C" through "G", all indicating that upon his learning of the identity of John Capra, this investigation began with relation to John Capra.)

12. This automobile is alleged to be the automobile driven by John Capra.

Detective Eaton's affidavit of June 16, 1972 with reference to a "bug" to be placed in the "Beach Rose Social Club" - 3203 Westchester Avenue - indicates the following:

"That since December of 1971, he has investigated and maintained surveillance on the Beach Rose Social Club and on many of the individuals who frequent that Club."

(It is to be noted that Detective Eaton learned about the Beach Rose Social Club as a result of the original illegal overheard of December 23, 1971 - which caused him to follow defendant Steven Dellacava.)

Detective Eaton, in the aforementioned affidavit, mentions Steven (Beansie) Dellacava as a party who has frequented the Beach Rose Social Club and he details the December 23, 1971 conversation between Capra and Steven (Beansie) Dellacava by submitting an affidavit in which that conversation is recorded.

John "Johnny Hooks" Capra is mentioned in the aforementioned eavesdropping warrant application and DETECTIVE EATON RELATES THAT, TO HIS KNOWLEDGE, CAPRA HAS NOT BEEN IN THE BEACH ROSE SOCIAL CLUB SUBSEQUENT TO FEBRUARY 3, 1972.¹³

We can further see evidence that this investigation commenced as the result of the overheard conversation on December 23, 1971 between Steven (Beansie) Dellacava and the defendant, John Capra, as Eaton's affidavit of March 8, 1972, hereto annexed as defendant's Exhibit "B", states - in attempting to receive an application for an eavesdropping warrant on RAY'S STATIONERY STORE - the following:

13. The Diane's Bar 1 - Diane's Bar 2 taps were terminated on February 4, 1972.

"The application before the Court seeks to renew the investigation to include Steven Dellacava, John Capra and the telephones bearing no. 822-9005 and 822-4636."

His affidavit also contains the fact that the conversation of December 23, 1971 occurred - by attaching an affidavit indicating same - and, he further states:

"During the course of late December ... evidence was uncovered which indicated that Steven Dellacava was acting in concert with ... John Capra ... to possess, transport and sell narcotics. ..."

Investigation involving eavesdropping warrant 87-1971 - the numbers given to the Diane's Bar warrants - specifically the one in which the illegal overheard of Capra and Dellacava was captured

"During this previous eavesdrop investigation, certain patterns of operation and behavior on the part of Steven Dellacava and John Capra ... were noted."

Due to the observations and leads furnished as a result of the Diane's Bar illegal overhears, Eaton opinions "that John Capra is the co-conspirator of Della Cava"; and he specifically uses - (a) phone calls between CAPRA and Dellacava; and (b) a journey by Della Cava to a social club at 3203 Westchester Avenue "... which Capra is believed to use as a center of operations ..." - he details that the first such journey occurred on December 23, 1971, A FACT RECEIVED as a result of the illegal overheard of December 23, 1971. A hearing will conclusively show to this Court that the illegal overheard of December 23, 1971 (a) identified the defendant Capra; and (b) identified his association with the defendant Dellacava; and (c) formed the basis for this investigation.

NOTE: Paragraphs 10 and 11 of Detective Eaton's affidavit of March 8, 1972 (Exhibit "D"). Specifically, Paragraph 12 seals the defendant's contention:

"It is my opinion ... that this conversation (December 23, 1971) involved the sale of narcotics. DELLACAVA asked CAPRA if he had a 'present' (a quantity of heroin) 'for them people', CAPRA said that he did, and less than two hours later, DELLACAVA went to 3203 Westchester Avenue to pick up the package." ...

The incidents described in Paragraph 10 and 11 above (Paragraph 10 is the conversation of December 23, 1971 - Paragraph 11 is the subsequent surveillance on that date) cause Detective Eaton: (a) to come to the conclusion that individuals in the social club used the telephone ~~of~~ the stationery store to conduct conversations dealing with the illegal sale and possession of narcotics; (b) to attempt to accumulate sufficient evidence against Steven Dellacava and John Capra since the illegal overheards at Diane's Bar (see Exhibit "A" specifically, paragraph 23).

It is contended that the conversation of December 23, 1971 - which we must label as the primary date or primary illegality which leads to all of the other evidence which becomes tainted, is referred to in the following affidavits of Detective Eaton.

1. January 6, 1972 - for an extension of the Diane's Bar No. 1 eavesdropping affidavit bearing telephone number 722-9595 attached hereto as Exhibit C.

2(a) March 9, 1972 - Ray's Stationery Store warrant bearing telephone no. 822-9005 and 822-4636.

(b) April 8, 1972 - Ray's Stationery Store warrant bearing telephone no. 822-9005 and 822-4636.

(c) May 8, 1972 - Ray's Stationery Store warrant

bearing telephone number 822-9005 and 822-4636;
all attached hereto as Exhibit "D".

3(a). June 11, 1972 - Steve's Air Conditioning, bearing
telephone no. 831-9247.

(b) July 12, 1972 - Steve's Air Conditioning bearing
telephone no. 831-9247.

(c) August 15, 1972 - Steve's Air Conditioning bearing
telephone no. 831-9247.

(d) September 15, 1972 - Steve's Air Conditioning bear-
ing telephone no. 831-9247;
all annexed hereto as Exhibit "E".

4(a) September 18, 1972 - For a "bug" at 1023 Havemeyer
Avenue.

(b) October 18, 1972 - For an extension of the "bug"
and a phone tap at 1023 Havemeyer Avenue;
all attached hereto as defendant's Exhibit "F"; and

5(a) February 15, 1973 - For a "bug" in Whitestone,
Queens; and

(b) March 20, 1973 - For an extension of the "bug" in
Whitestone, Queens.

A full reading of each and every affidavit subsequent to
that illegal overheard will indicate to the Court that that was
the primary illegality which commenced and also tainted the
Government's case against the defendant, John Capra.

Nevertheless, if needed, a full hearing on this motion to
suppress all the evidence received as a result of the illegal
overheards of John Capra (see also Point III) will be necessary
in order for the defendant to indicate to the Court that his
identity and association was learned by the police as the result
of the primary illegal overheard. Therefore, all evidence against

the defendant is inadmissible because it is the product of an unlawful act and obtained through the exploitation of an unlawful act.

Counsel should have the right to examine the investigating officers so as to identify and trace the unlawful overheard taps and the trail of its "fruit."

It is emphasized and reiterated that the enclosed exhibits "B" through "G" reaffirm the defendant's position that can cause this Court only one conclusion - the ultimate suppression of all of the evidence gleaned from the primary illegality and the dismissal of this indictment.

II.

CONTROVERSION AND SUPPRESSION OF ALL
EAVESDROPPING WARRANTS AND THEIR PRODUCTS.

The defendant Capra moves to controvert all the electronic eavesdropping warrants issued herein as they affect him¹⁴ and suppress all conversations, leads and information received by law enforcement officials as a result of the utilization of the aforementioned electronic eavesdropping warrants and their extensions.

14. Exhibit A - Order allowing the interception of telephone communications of Joseph Della Valle with co-conspirators, accomplices, etc. over phone no. 722-9595, subscribed by a bar and grill located at 2034 Second Avenue - previously known hereto as Diane's Bar - said surveillance commenced on December 8, 1971 and continued to January 6, 1972.

Exhibit C- Extension order of the aforementioned Diane's Bar phone tap, which now included Steven Della Cava. Said extension ran from January 6, 1972 through February 4, 1972.

Exhibit D - Various orders authorizing wiretap of phone numbers 822-9005 and 822-9636 from March 9, 1972 through June 6, 1972. (Defendant Capra is named on two of the three wiretap orders as a party to be surveilled).

Exhibit E - The electronic interception of communications of the phone at Steve's Air Conditioning bearing 831-9247 from June 11, 1972 through October 15, 1972. Defendant Capra is never named in the aforementioned orders.

Exhibit F - An electronic eavesdropping instrument - a "bug" on premises 1023 Havemeyer Avenue in The Bronx commencing September 18, 1972 through November 16, 1972 - Capra is named as a principal party to be surveilled in these two "bug" warrants.

Exhibit G - Electronic eavesdropping devices inside of premises 9-20 166th Street in Whitestone, Queens to receive the conversations - John Capra is named in both the original order and the "so-called extension". The original "bugging" order commences on February 20, 1973 and the so-called "extension" ends on April 9, 1973. (This will be discussed later on).

1. NOTICE

The second reason¹⁵ that the defendant alleges to this Court is the provisions of the New York State Criminal Procedure Law, §700.50(3)¹⁶ mandate that formal notice must be served upon a defendant within a ninety day period. It is indicated to this Court that at no time was any proper statutory formal notice given to the defendants within the ninety day period or even within a reasonable period thereafter.

The first occasion that defendant Capra received notice of the fact that his voice was recorded pursuant to an electronic eavesdropping warrant and extensions was at the time his attorney received copies of the orders, affidavits and extensions. (Counsel's recollection is that this occurred some time during the May or June 1973 Term of this Court).

However, at no time prior to counsel receiving notice was any notice afforded to the defendant Capra.

It is recounted for the Court that the defendant Capra's voice was heard (a) during the order as to phone no. 931-2417 during February to March of 1971. (Attached hereto as Exhibit "H"); (b) from December 1971 to February 1972 at the Diane's Bar (Warrants attached hereto as Exhibits "A" and "C"); (c) On April 11, 1972 at Ray's Stationery (Warrants attached hereto as Exhibit "D"); (d) Between June and September of 1972 - Steve's Air Conditioning - Warrants attached hereto as defendant's Exhibit "E"; (e) From September through November of 1972, -

15. The first and more important reason pursued by defendant Capra is related to the Court in Point I in which he indicates that his identity was learned as the result of an unauthorized listening and interception by the police with regard to the conversation at the Diane's Bar between Capra and Steven (Beansie) Dellacava.

16. Similarly, 18 U.S.C. §2518(8)(d)..

the Havemeyer bug - warrants attached hereto as Exhibit "F"; and (f) From February 1973 through March 1973 - the Whitestone bug - warrants attached hereto as Exhibit "G".

It is contended by the defendants that the lack of notice invalidates each and every warrant singularly, jointly and in their totality, and that all conversations of the defendant Capra must be suppressed together with all of the tainted leads and information that flow therefrom.

The defendant Capra further contends that during all the periods and times hereinbefore mentioned that the eavesdropping warrants were in existence (a) he had a proprietary interest and was a principal officer of the Diane's Bar¹⁷; (b) that he had a proprietary interest and was a principal officer of Steve's Air Conditioning; (c) that he was a tenant and a principal in the Havemeyer Club; and (d) that he was a tenant and principal at the Whitestone apartment.

2. TOO EXTENSIVE

It is further contended that with regard to the eavesdropping warrant^s they invested in the police officers too much discretion and further were too extensive and too broad in that they allowed interceptions to continue for periods of time to indicate its abuse rather than its proper use.

17. As reaffirmed by the affidavit of Detective Eaton with regard to information given him by his confidential informant in the Ray's Stationery affidavit. - As further corroborated by the affidavit of Steven Dellacava submitted on behalf of his motions, dated September 5, 1973.

3. NO INVENTORY, SEALING OR RETURN OR JUDICIAL SUPERVISION.

The eavesdropping orders were further improper in that they did not follow the dictates of the New York State statute in that the tape recordings were not properly inventoried nor were they ordered to be properly sealed as the statute so mandates.

It is further to be noted that the orders lack a proper decretal paragraph calling for a return to be made of the warrant. To date, counsel has no ^{h^a} knowledge of whether returns were ever filed in any of the tape recordings and warrants involved in this case. All of the "wiretapping" and "bugging" in this case was done without a hint of judicial supervision during the continued interceptions and in flagrant violation of the inventory and notice provisions of 18 U.S.C. §2518(d) and New York Consolidated Laws, Chapter 11-A, Criminal Procedure Law §700.50(4).

4. MINIMIZATION.

It is further alleged that there was total lack of proper minimization with regard to the "wiretapping" and "bugging" in question. Even though the Government has consented to a hearing on the question of minimization, counsel feels constrained at this time to point up some of the abuses with regard to the question of minimization.

(a) Conversations with attorneys were listened to and in some cases, not only were they listened to, recorded, logged, but actually transcribed.¹⁸ Conversations between unnamed parties specifically unauthorized¹⁹ and having no basis for the uninvited ear of the police were listened to, logged and transcribed.

18. One mere example is attached hereto as defendant's Exhibit "I".
19. As was the conversation of December 23, 1972.

As stated in Point I above, three conversations of the defendant Capra were illegally recorded, logged and transcribed (see Exhibit "B" attached hereto).

Innocuous, nonsensical and unreasonable listening, logging and transcription was accomplished by the police through this period from December 8, 1971 to February 14, 1973. The tape recordings reveal that the police were more interested in listening to conversations than complying with the dictates of the Court - i.e. - the defendant Leo Guarino, on August 9, 1972, attempts to inquire from the Museum of Modern Art as to whether a statue that he purchased was actually a Verroccio or not. The course of these conversations occurs at Steve's Air Conditioning and are found on Reel A-3221 of 8/9/72. The tapes reveal that he is taken through a conversation from the commencement of his request of the telephone number of the Museum of Natural History (he dialed 411) through conversations with several people at the museum asking information about the statue - through continued telephone calls to other people, all in conjunction with the statue - upon listening to this conversation, the Court could have no doubt that there was not even an attempt to minimize.

The minimization hearing will indicate to the Court that the police listened to everything, recorded almost everything, logged everything and transcribed many conversations that were non-pertinent (as the logs themselves indicate).

The various affidavits of Detective Eaton alleged that at times the tape recorder was turned off but the police continued to listen. (Comment: The tape recorder was turned off very very rarely.)

A complete listening to the tapes of the Diane's Bar conversations will show this Court that almost every conversation was obviously non-narcotic and non-inclusive with regard to the orders thereof - but yet the police continued to listen.

One can hear a conversation between a bondsman and a prospective indemnitor, husbands and wives, boyfriends and girlfriends, orders for meats, bread - if anything, the worst offenses occur when there are follow up conversations. In other words, when a party has completed a completely innocent and innocuous conversation and he calls a second party with regard to that conversation, the police continue listening and if he called a third party with regard to that, the police continued to listen - again.

From December 8, 1971 to February 14, 1973, there was always the constant ear of the constable with regard to the tape recordings. The utter and complete lack of proper minimization mandates that not only should the conversations all be suppressed, but all leads and information flowing from them must be suppressed - that all the words flowing from them should be controverted and that there should be penalties upon those that are acting in such a manner as to violate defendant Capra's Fourth, Fifth and Sixth Amendment rights in that this indictment must be dismissed.²⁰ It is further pointed out that the wiretap of telephone number 931-2886, which was the subject of an

20. It is further interesting to note that one of the orders herein did not even contain the required minimization clause, (see Exhibit "D" attached hereto) - second extension order granted on May 8, 1972. Another indication of the lack of minimization is the note on page 66 of the logs "playing back tape" - in all probability the tape recorder was left on automatic. This occurred on January 3, 1973. To date, counsel has not seen nor received copies of transcripts with regard to the aforementioned issue. However, minimization in this order is not in accordance with C.P.L. §700.30(7) nor 18 U.S.C. §2518(5).

eavesdropping warrant (attached hereto as Exhibit "H") from February 23, 1971 to March 24, 1971 is so broad that it does not even contain the name of the individual to be intercepted. It merely orders the interception of "any and all telephonic communications" over telephone number 931-2417. Neither the parties, nor the subject matter of the conversations were delineated in the order and that is fatal to that order. Total discretion was left in the hands of the police to monitor everything and thereby a general search was consummated.²¹

5. UNAUTHORIZED LISTENING

A relevant listening to the tape recordings will indicate that the selections placed in the eavesdropping warrants for extensions and other eavesdropping warrants were basically and in the majority selections gathered from (a) illegal and unauthorized overheards; (b) non-pertinent conversations; (c) bad faith portions taken from the tape recording without relating to what the actual conversations were related to; and (d) at the most part, rather obviously unrelated to the question at hand in the crime under investigation.

The above allegations only allow the illegalities to bear further "fruit" begetting further illegalities.

6. PROBABLE CAUSE

Many of the eavesdropping warrants are based on the so-called expertise and opinion of the law enforcement agent,

21. However, in view of the fact that counsel has been led to believe that the Simone order and transcriptions play no great role in this scenario, he will not delve into that issue in as full detail as he will the pertinent orders outlined as Exhibits "A" and "C" through "G" herein - however, counsel wishes at this time once again to request the transcripts of the 931-2417 tape recordings and the aforementioned tape recordings.

Detective George Eaton. (As will be treated below,) we may see that many of those opinions were fallacious rather than non-expert and totally out of context - much information is also "stale".

A total listening to the tape recordings in this case will further bolster the idea that the manipulation of conversations into what is hoped to be a drug setting is thoroughly an artificial device accomplished in an unscrupulous manner.

The warrants, (as discussed above, and particularized below) were not based upon probable cause in that (a) they were based upon illegalities begetting illegalities; and (b) that they were based upon facts insufficient to accumulate probable cause - once the illegalities are taken out of the orders - if possible in this case; and some of the orders were based upon the apparent perjury, misstatements and illegal acts of law enforcement officials.

7. CONSTITUTIONALITY

The defendant further alleges that the eavesdropping statutes, both Federal and State, and the manner in which they were used in this case, are unconstitutional and were used in violation of Capra's Fourth, Fifth and Sixth Amendment rights to the United States Constitution.²²

8. HEARING

If the Court decides not to find the above mentioned statutes unconstitutional, it is further contended that the acts

22. Title 18, U.S.C. §2510-2520 et seq. - Act of June 19, 1968, P.L. 90-351, Title 3, Section 802, 82 Stat. 212 and Article 700 of the Criminal Procedure Law of the State of New York.

actions, warrants, orders and proceedings hereunder are violative of the aforementioned pertinent statutes and therefore a hearing should be held to controvert the warrants issued hereunder, suppress all evidence, leads and other material gathered by the police as a result of the aforementioned warrants, together with a full dismissal of the entire indictment.

III.

THE WARRANTS SHOULD BE CONTROVERTED
AND ALL FACTS AND EVIDENCE RECEIVED
THEREFROM SHOULD BE SUPPRESSED.

Alternatively, the defendant contends that all of the specific warrants, orders and actions of law enforcement officials pursuant to the warrants were illegal and as a result of the fact that one order formed the basis for the next order, it will be necessary to examine the orders and extensions as they affect the defendant Capra:

A. DIANE'S BAR WIRETAP NO. 1 (Attached hereto as Exhibit "A") - The original eavesdropping warrant bearing the following caption "In the Matter of the Interception of Telephonic Communications of Joseph Della Valle with Co-Conspirators, Accomplices and Agents Over Telephones Bearing the Numbers 722-9595 subscribed to by a 'bar and grill' located at 2034 Second Avenue, New York, New York", was granted on the 8th day of December, 1971 by a Justice of the Supreme Court of New York County.

The order specifically is effective from December 8, 1971 through January 6, 1972.

The order specifically provides "that the District Attorney of New York County, or any police officer acting under his direction is hereby authorized and empowered to intercept and record telephonic conversations of Joseph Della Valle over the above described telephones ..."23 This is the first

23. As previously discussed in Section 2, this is one of those orders that does not contain a provision for notice, judicial supervision, proper sealing of tapes, or the fact that a return shall be made - this is more extensively discussed in our affidavit and memorandum of law presented herewith as to Point II.

Detective Eaton affidavit and is an affidavit in which he seeks the ultimate right to wiretap the conversations of Joseph Della Valle at 722-9595. He commences his affidavit by the indication that he has a confidential informant.²⁴

The remaining paragraphs with regard to the confidential informant contain misstatements of fact and what counsel's investigations have determined was purposeful on the part of the police officer.²⁵

However, if the Court directs, we shall submit to the Court in camera the reasons and bases for our understanding and knowledge of the aforementioned alleged perjury - nevertheless, this will be brought out at the hearing on the motion to suppress.

It is contended by this affidavit that Paragraph "3" through "8" contain intentional misstatements which could not have been known to the presiding Judge when he read Detective Eaton's affidavit.

24. Pursuant to investigation, your deponent indicates to the Court that the confidential informant is a gentleman by the name of Bode - who, we respectfully request the Government provide at the hearing and prior to the hearing on the motion to suppress so that he may be interviewed by defense counsel.

25. Counsel prefers not to outline the alleged perjury in this affidavit in view of the fact that it will lose its effectiveness as a tool in destroying the credibility of Detective Eaton, who has caused to be placed before various courts affidavits containing inaccuracies, distortions and misstatements.

I am further informed that Paragraphs "14" and "15" which provide the "meat" for the attempted allegation of probable cause, is completely untrue and did not occur.

The remainder of the affidavit deals with rather innocuous facts regarding people entering and leaving restaurants, homes, etc. The affidavit concludes that Detective Eaton has been conducting an investigation of Joseph Della Valle since the latter part of September, 1971 - nowhere does it mention the defendant Capra nor does it refer to the defendant Capra - in fact, there is a complete void and an obvious lack of knowledge of the defendant Capra. However, as a result of this improper warrant being granted, the police, through a complete disregard to the limiting instructions in the order, listened to conversations between Steve Della Cava and John Capra, as most extensively laid out in Point I of the affidavit and memorandum of law attached hereto.

The tape recordings of all of these conversations pursuant to this first warrant shows, as in all of the other tape recordings, a complete lack of proper minimization and an intentional disregard of the dictates of the Court order, the log does not indicate at all that the tape machine was ever shut off - as will be found in the other logs relating to the "Eaton tapes", (Exhibits "A", "C" through "G" attached hereto). There is no need to constantly repeat and reiterate that almost all conversations are so innocuous that the officers should have stopped listening immediately - MANY OF THE ELECTRONIC SURVEILLANCE INVASIONS IN THIS CASE CAN BE SO CHARACTERIZED.

It is alleged that not only does the affidavit on its face lack probable cause, but if necessary at a hearing, the

disregard of probable cause and misstatements will be fully shown to the Court so as to suppress all conversations, all leads and all evidence that flowed therefrom, including dismissing the indictment.

Three conversations of the defendant Capra were recorded, logged and transcribed. (The transcriptions thereof are attached hereto as Exhibit "B"). Two of the aforementioned conversations picked up during the period of wiretapping the Diane's Bar (722-9595) were in contravention of the order of December 8, 1971 and occurred during the period delineated in the order between December 8, 1971 and January 6, 1972. These two conversations, together with all of the illegal conversations picked up as a result of the unauthorized listening to the defendant Dellacava, form the basis of probable cause for the second Diane's Bar order.

Our original motion to controvert the search warrant allowing electronic surveillance is renewed here, and we further move to suppress all conversations, together with all leads, information and other warrants and orders that flowed therefrom.

It is emphasized that neither Dellacava nor Capra were allowed to be intercepted unless they were parties to a conversation with Della Valle. It is contended that the tape recordings, logs and transcripts do not show one phone conversation between Capra and/or Dellacava with Della Valle. The result of the purposeful listening and the non-minimization caused the following to be learned by the New York City Police Department:

- a. The identity of John Capra;
- b. The relationship with Steven (Beansie)

Dellacava;

- c. The existence of Ray's Stationery²⁶;
- d. Capra's automobile;

form the basis for each of the orders that we are attacking herein.²⁷

B. DIANE'S BAR NO. 2 - Extension and amendment of eavesdropping warrant of Diane's Bar No. 1 - bearing the following caption - "In the Matter of the Interception of Telephonic Communications of Joseph Della Valle ... and Steven Dellacava ... With Co-Conspirators, Accomplices and Agents Over the Telephone Bearing the Number 722-9595, subscribed by a 'bar and grill' located at 2034 Second Avenue, New York, New York" - (annexed hereto as Exhibit "C"). The same objections to the face of the warrant are made in this warrant as they have been made in Diane's Bar No. 1 of this section of the affidavit.²⁸

This extension was ordered on January 6, 1972 and terminated on February 4, 1972. The basis of the probable cause runs from the illegal overheard and unauthorized interceptions and resultant investigations caused by the electronic surveillance of the order in Diane's Bar from December 8, 1971 through January 6, 1972 (Exhibit "A").

26. (which is the subject of 90 days worth of wiretapping later on.

27. It is interesting to note that Detective Eaton continuously attaches his tainted affidavits to the subsequent orders.

28. See also Point II of the affidavit and memorandum of law, together with all of the comments made therein together with the comments made with regard to Diane's Bar No. 1 as discussed in this Point - This Point is being raised for all of the warrants being attacked hereto and being moved to suppress and shall not be repeated due to the fact that it would be an unnecessary repetition.

Paragraph "6" of the Eaton affidavit transcribes the conversation that was marked "non-pertinent" in the logs of the surveilling officer and a conversation had on December 11, 1971 not by or with Joseph Della Valle. Therefore, that is an illegal overheard. The affidavit continues on with all illegal overheards as a result of the Diane's Bar No. 1 tap as only one of the conversations referred to is with the subject of the order, Joseph Della Valle, - with an unknown party.

Paragraph No. "8" for the first time relates a "Capra conversation" giving his home telephone number and the fact that the conversation was with Steven Dellacava - none of the parties mentioned in the original warrant.

Paragraph "13" details the conversation of December 23, 1971 between Capra and "Beansie". It leaves out the beginning of the conversation which is attached hereto as part of Exhibit "B", whereby a telephone call is made by Dellacava, to 822-9005 - Ray's Stationery - Dellacava asks for Johnny Hooks. A woman answering the telephone says, "Just a moment", goes next door and then Capra gets on the telephone. There is no reason for the police to have maintained this tape for this period of time, knowing that not one of the parties involved was Della Valle - after listening to the prologue of the conversation and hearing the voices, knowing that Della Valle was not part of that conversation. It is the conversation of paragraph "13" that is a thread interwoven with all of the affidavits with regard to Capra. It is this illegality which has opened up the flood of taint and should cause suppression of all evidence and facts revealed thereby, together with the

dismissal of the indictment as to the defendant John Capra.²⁹

As a result of the monitoring of that unauthorized interception, we then see that the police further learn of the Beach Rose Social Club.³⁰

The identity of Dellacava, Capra, Ray's Stationery and their so-called drug related operation comes about as a result of the illegal overheard on the Diane's Bar 1 surveillance and is a great part of the basis for the order herein.

The illegal overheard is repeated twice in the affidavit and the surveillance as a result thereof is repeated and the emphasis is placed upon the fact that the police have "made a find" and established a narcotics relationship.³¹

Based on Diane's Bar No. 1 overheards, Diane's Bar No. 2 order is signed allowing another thirty days of electronic surveillance. The logs (page 6A of the logs of January 7 to February 3, 1972), indicate that the police transcribed non-pertinent conversations between Capra and Dellacava on January 13, 1972, January 15, 1972 and several other innocuous conversations - some of which are used to obtain probable cause for other orders - all of which are illegal in themselves, a result of an illegal intrusion, and a warrant based upon illegal and unauthorized overheards causing evidence to flow.

29. As an aside, the construction placed upon that conversation by the police officer as relates to his surveillance caused thereby is totally incorrect. The facts are totally misconstrued and this is not a narcotics related proposition.

30. Another subject of subsequent (June 23) order to plant a "bug".

31. As an aside, their observations revealed something quite to the contrary.

C. RAY'S STATIONERY - Orders of (1) March 9, 1972 - April 7, 1972; (2) April 8, 1972 through May 7, 1972; (3) May 8, 1972 through June 6, 1972; annexed hereto as Exhibit "D" - mandate the interception of Steven Dellacava and John Capra with each other and with their co-conspirators, etc. over telephone number 822-9005 and 822-9636.³² So-called "probable cause" as to Capra is gleaned solely from the conversations overheard on the Diane's Bar No. 1 tap - said surveillance and interception and listening were unauthorized and therefore illegal. This tainted background provides the alleged "probable cause" for placing Capra on the face of the eavesdropping order and as a subject of the electronic surveillance. These warrants, as being based upon illegalities as to him and totally tainted as to him. Therefore, - as to defendant Capra - the warrants should be controverted and all that flowed should be suppressed.

It is again noted that Warrant No. 87/1971 - Diane's Bar 1 and 2 - were annexed as part of the application for the wiretapping of Ray's Stationery.

If anything, the affidavit of Detective Eaton for Ray's Stationery indicates that he blundered upon Capra through his unauthorized hearing - "during the course of late December, January and early February, evidence was uncovered which indicated that Steven Dellacava was acting in concert with ... John Capra ... to possess, transport and sell narcotics. The interception of conversations and the conducting of surveillance

32. Exhibit "D3" indicates that Capra is not a named party and has been dropped from the caption. However, Exhibits "D1" and "D2" place Capra as a named party for the first time in the eavesdropping warrants herein.

culminated on February 3 ...". There is now no question that as a result of the electronic surveillance of Diane's Bar, John Capra was discovered and the police reasoned him to be a co-conspirator with Dellacava.³³ The affidavit presented clearly indicates that all of the facts learned about Capra were as a result of the illegal, unauthorized overhears pursuant to the surveillance of Diane's Bar. Detective Eaton specifically states that his opinion is based upon the December 23, 1972 telephone call between Dellacava and Capra and the resultant flow thereof. All of Eaton's original presentation is as a result of the Diane's Bar tap.³⁴

[NOTE: We do not concede that the illegalities constitute or allow probable cause].

The second affidavit (4/7/72 - Exhibit "D") is nothing new to his statements about Capra - he again REITERATES THE CONVERSATION AND RESULTANT SURVEILLANCE OF DECEMBER 23, 1971. The only addition is the fact that Capra was visited at his home in Westchester County by a so-called "major narcotics violator" and that on March 16, 1972, a conversation took place between a "Dom and Joe" - totally unauthorized as they were not named parties on any order - supposedly indicating "that Capra is still involved in narcotics ...". A listening to the tape recording will find that this conversation is taken out of context and is a conversation totally unrelated to narcotics and that a

33. and also Guarino and John Brown - which we do not endeavor to discuss due to the fact that we do not wish to further prolong the presentation of this point and it is fully covered in Detective Eaton's affidavit.

34. He again reiterates the activities of December 23, 1972. He discloses some further conversations between Capra and Dellacava at the Diane's Bar and the rest of the affidavit is totally lacking in pertinency or probable cause as to Capra.

reasonable man, including an expert narcotics detective, should so find.

The remainder of the application says nothing about Capra and he is maintained in the caption of the warrant for another month. Finally, on May 8, 1972, when another 30 day extension was granted for Ray's Stationery (now making the overheard 90 days) Capra's name was dropped. But mention was made of a telephone call from Dellacava to Steve's Air Conditioning - a premises in which Capra, at the time, had a proprietary interest. The conversations were then picked up between Dellacava and Jimmy the cook, thus leading us to

D. STEVE'S AIR CONDITIONING - which is wiretapped from June 11, 1972 through October 15, 1972 - pursuant to four orders annexed hereto as Exhibit "E" tapping the telephone number of 831-9247 located at 2036 Second Avenue.

John Capra is not named in any of the aforementioned eavesdropping warrants. However, it is contended that he has a proprietary interest in the aforementioned store.

Eaton's first affidavit traces the origin of the investigation from Diane's Bar No. 1 tap through Ray's Stationery and now on to Steve's Air Conditioning. (We now have wiretap orders commencing December 8, 1971 which will continue through October 15, 1972 - all related to this case.

Probable cause is based upon the fact that Dellacava made calls from Ray's Stationery to this place of business. The affidavit of Eaton contains basically the same old material as found in the other affidavits and he continually attaches his prior affidavits to this new application. Again, he states:

"During the course of late December, January and early February (Diane's Bar taps) evidence was uncovered which indicated that Steven Dellacava was acting in concert with ... John Capra ..."

This affidavit contained the illegal overheard which were originally based on the order of December, 1971 (Diane's Bar No. 1 - Exhibit "A"), and in the order of January 6, 1972 - (Diane's Bar No. 2 - Exhibit "C") - which was created by illegal overheard attempting to create probable cause from the first Diane's Bar order.

Eaton again reaffirms that his investigation with regard to Capra commenced by his receiving a telephone call from Dellacava during December of 1971 which caused him to commence the investigation and continue the trail of taps.

An interesting paragraph on page 6 of Eaton's first affidavit for the Steve's Air Conditioning, indicates that there was a purposeful attempt to avoid giving the parties notice of the taps. Detective Eaton mentions that conspiracy charges were dismissed against Della Cava and Guarino by the Assistant District Attorney (who is involved in all of these wiretaps) - "with leave to present to a Grand Jury on a subsequent date". Obviously, the reasons for the lack of prosecution with regard to that matter was to avoid giving the parties notice that there were taps and that they were overheard. The rest of the affidavit details surveillance that occurred as a result of the illegal overheard - unreasonable opinions of Detective Eaton - unreasonable interpretations of conversations and all based upon

a continuous chain of illegal orders.³⁵

An example of constant purposeful misinterpretation of conversations can be found in Paragraph "10".³⁶ The conversation related to in Paragraph "10" of Detective Eaton's affidavit dated July 12, 1972 constitutes listening on an unauthorized "bug" rather than on a "wiretapping" which was authorized. However, if the Court would listen to Reel 3, side 2, it would find the prior background of that conversation, which is one between "Jimmy Rinaldi" and his girlfriend, giving full and total backgrounds and showing that Paragraph "10" is nothing but an innocuous non-narcotic non-crime related conversation - in fact, a listening to the tapes of Steven's Air Conditioning is requested so that the Court may see that the conversations elicited from, as well as practically all of the other conversations flowing throughout the orders are out of context and non-narcotic related. It is clearest at Steve's Air Conditioning that the conversations are business related to the air conditioning business.³⁷

35. It is at this point suggested that not only for this order but for all of the orders, there should have been some type of judicial supervision so as to eliminate the problems that occurred herein. Again, the activities of December 23, 1971 are discussed in the affidavits forming the basis for the Court order of surveillance of Diane's Bar are reiterated.

36. The overhearing of this conversation is certainly illegal as it was an unauthorized "bugging" - not a wiretap - the police who had installed a listening device in the telephone took the occasion to listen to a conversation that took place inside of Steve's Air Conditioning instead of avoiding listening to that situation.

37. Steve's Air Conditioning as well as the Diane's Bar taps are classic examples of the lack of minimization at its worst.

Detective Eaton's affidavits continue to include unauthorized overheard purposeful and obvious misinterpretation and interceptions of individuals who are not supposed to be heard pursuant to Court order, - all of which will be shown at a hearing requested of this Court to controvert the warrant, suppress the evidence and leads flowing therefrom and forming the basis for a dismissal of this indictment. On September 13, an "informant" allegedly entered the picture thereby leading us to

E. THE HAVEMEYER CLUB³⁸ - On September 18, 1972, a "bug" was ordered to be placed into the premises of 1023 Havemeyer Avenue in The Bronx to overhear, intercept or record the conversations of Steven Dellacava, John Capra, Michael Capra, Leo Guarino and Lenny Filliponi, with each other and with their co-conspirators, etc. It is contended that this order as well as each and every "bug" cannot meet the requirements of the Fourth Amendment, that there is no minimization of a "bug" and that as a result thereof, it could not be constitutionally implanted. As this "bug" and the subsequent "bug" in the Whitestone apartment was a continuous "bug" and is as much, a general search as should be prohibited.

With regard to the Havemeyer order, it is noted that on the face of it, we find it rather defective (see Point II and other points raised herein). It also carries the constant paragraph that the order shall not terminate when the communication desired has been received - we hold that for this order and

38. On June 26, 1972, a conversation was intercepted between John and Michael Capra and partially transcribed - John and Michael Capra are not named in the caption of the order - the logs maintain these conversations to be non-pertinent; however, they are transcribed. In those conversations, John Capra mentions the Club, which is later related to be the Havemeyer Club.

for each and every other order referred to herein causes such an "overkill" as to taint the entire proceedings including the order being looked at.

The Havemeyer order is completed one day later than it should be (see last decretal paragraph of order of September 11, 1972).

The Havemeyer affidavit of George Eaton is perhaps the most unbelievable and remarkable affidavit your deponent has had occasion to read in the years he has been in the practice of law - I would daresay - including my several years at law school.

A reading of this affidavit will indicate that the observations and opinions of the police officer are so divergent that a reasonable police officer would have to be on the verge of hallucination in order to receive the conclusions that Detective Eaton did. Again, the facts of December 23, 1971 are introduced into the affidavit clearly and without exception. The affidavits for the Diane's Bar wiretaps are included along with this present affidavit of Detective Eaton. Detective Eaton once again goes back approximately one year and details all that he has done with regard to his electronic surveillance.³⁹

Paragraph "5b" relates a conversation that he overheard between Michael and John Capra - from Steve's Air Conditioning - i.e. illegal overheards by non-named parties in the eavesdropping warrant, in which he learned of the expression "the Club".

39. Includes all of the illegal overheards (details in prior sections of this affidavit) including all of the leads, misinterpretations, fallacies, etc.

Most of the affidavit is non-pertinent as to Capra - and as a matter of fact non-pertinent as to the other individuals named in the caption of the order.

However, the affidavit presented to the Court contains impossibilities - which may have been typographical error rather than imagination of the detective. On page 5 of paragraph "5f", we note that Detective Eaton discussed a surveillance of July 17, 1972 - which he learned about on July 12, 1972.

It will be an easy matter for the detective to explain that that might have been a typographical error. However, the comment made to this Court is that the invasion of privacy ordered by a Court is such a serious matter that an affidavit should not be presented containing such inaccuracies.

There is a mention of one Lenny Filliponi, who allegedly was bringing (pursuant to Detective Eaton's total misinterpretation) narcotics - actually he was bringing food to 1023 Havemeyer. It is my contention that upon cross-examination of Detective Eaton, it will verily be shown to the Court that he could have drawn no other conclusion but that Mr. Filliponi was bringing food rather than narcotics. Nevertheless, we portend that at a requested hearing, we may so prove. The remainder of the Havemeyer affidavit contains such unbelievable remarkable and unbearable conclusions that on its face, it lacks great credibility. However, at the requested hearing, counsel will further indicate to the Court the inconsistencies, misinter-

pretations, unreasonable opinions and impossibilities⁴⁰ that are contained in the affidavits of Detective Eaton.

The affidavit is "chock full of" bad guess work. A mere reading of the Havemeyer affidavit by this Court would certainly cause it to have some great question about the credibility of Detective Eaton. A police officer does not have a license to "wildly" conjecture nor form illfounded conclusions in obtaining eavesdropping warrants.

Counsel, in good faith, represents to this Court that a mere reading of this affidavit will indicate an "Alice in Wonderland" approach combined with impossibilities, singulars that become plural and other errors which should not cause extensive eavesdropping orders to issue. At one point, in his affidavit (at page 15) Detective Eaton submits: "It is difficult to ascertain precisely what these events add up to. However, based on experience in investigating this group,⁴¹ I have arrived at these tentative conclusions."

On Page 17, the police officer admits "Opinion" - we would be hard pressed to call it kindly - "hallucination". Suddenly, at the end of the affidavit, we are confronted with a "confidential informant". There is no corroboration for his reliability nor is any rendered. It is counsels' belief that the so-called informant is one James Rinaldi - known to the police to be a rather unreliable and imaginative and inventive individual with no habit for telling the truth. Not

40. At this stage of the proceeding, counsel could again submit to the Court in camera if it so ordered, a simple portion of Detective Eaton's affidavit which is apparently impossible on its face. Counsel desires not to divulge same in this affidavit as he respectfully submits that for the purposes of testing Detective Eaton's credibility, it would be best that it be done at the time of the hearing.

41. originating with December 23 conversation as to Capra.

only is there no corroboration, there appears to be no dates or times as to the events he allegedly related to the officer.

We call upon the Government to produce him so that we may question him with regard to what he alleged in the Havemeyer affidavit, and would also move to suppress his testimony due to the fact that he was learned about as the result of an unlawful intrusion.

Since the Government has indicated that they will not call Rinaldi as a witness, we only wish to attack his statements in the affidavits as (1) the product of an informer who is not reliable and (2) as the result of illegalities.

The "bug" (1) expired on October 17, 1972. On October 18, 1972, an extension is received by Detective Eaton (annexed hereto as part of Exhibit "F").

This affidavit again relates back to the fact that the police learned of Capra's relationship with Dellacava, et al. as a result of the illegal overheards way back in December of 1971. Detective Eaton again relates the chain of evidence commencing with the illegal conversations that he picked up originally at the Diane's Bar, commencing with the order of December 1971. There can be no question but that all of the wiretap warrants, information and evidence forming the basis of this case flowed therefrom and is tainted. The Havemeyer affidavits (Exhibit "F") solidify the chain of illegalities emanating from the primary taint received through the conversations of parties that were not to have been listened to during December 1971 in the Diane's Bar - telephone number 722-9595. (See Exhibits "A", "B" and "C"). The affidavits further indicate that the chain of warrants are

again based on the primary illegalities and continued illegalities, the overhearing of individuals who should not be overheard, the following of leads that were learned about as a result of unauthorized listening. Illegality begets illegality, warrant piles on top of warrant and suppression is the only remedy left to the defendant Capra. The chain of purposeful misinterpretations, inaccurate facts and fictitious circumstances pervade the Havemeyer affidavits, and continue on to the

F. WHITESTONE APARTMENT: On February 15, 1973, another "bug" was authorized to be placed at 9-20 166th Street

factor of probable cause with regard to bugging the apartment at Whitestone is missing.

We have seen personally 16 months of wiretapping and bugging that commenced with an order of December of 1971. All of the aforementioned orders are based upon the original order of December, 1971 and the unauthorized overheards received thereby. Furthermore, there transcends through this entire chain of wiretapping and bugging, constant threads of illegal overheards, lack of probable cause, fallacious statements, impossibilities and what one might call untruths placed before the Court by the police officers.

Furthermore, as a result of these orders, search warrants were obtained based upon these orders for (a) Diane's Bar; (b) Steve's Air Conditioning; (c) the Havemeyer Club; and (d) the Whitestone apartment. We include in our motion to controvert the warrants and suppress all of the evidence and leads seized thereto an application addressed to those search warrants. On their face, those search warrants were the product of the primary illegality and the taints that flowed therefrom.

That with regard to the above application to further controvert the search warrants, it is placed before the Court on behalf of the defendant Capra that (a) he neither consented to the aforementioned searches; (b) they were not incident to a proper arrest; nor (c) did they contain probable cause within the law.

It is to be remembered that the defendant Capra was a part owner of the Diane's Bar all during this period of time and was a principal officer of same; that he had a proprietary interest in Steve's Air Conditioning and was a principal officer

of same and that he was an occupant and tenant of both the Havemeyer and Whitestone premises.

This portion of the affidavit is presented before the Court to controvert the warrants allowing electronic surveillance (both wiretapping and bugging) and the search warrants issued on the above mentioned premises, together with the suppression of all of the evidence that flowed therefrom as a result of the original and the continuing taint, together with the individual illegalities and taints that have been presented to the Court as above mentioned. Ultimately, we seek not only suppression of the evidence but dismissal of the indictment.⁴²

We further move to dismiss the indictment if the hearing discloses that such illegally obtained or tainted evidence was presented to the Grand Jury which returned the indictment.

42. With regard to the wiretap of 212-931-2886, ordered on February 23, 1971 (Exhibit "H"), it is contended by the Government that the aforementioned shall not be used; however, we are constrained to note in passing that if the defendant Capra's conversations were caught by this wiretap, we would move to suppress those as a result of the fact that (a) the order is overbroad in that there is no subject of the order, only a telephone number, and the order has questionable probable cause in that the confidential informant related thereto is not held out to be reliable. The overbreadth of that order is signified by the fact that it permits "any and all telephonic communications being transmitted over telephone bearing number (212) 93102886. However - in all candor - we see no present harm done to Capra pursuant to those interceptions if they occurred.

IV.

SUPPRESSION OF THE HEROIN AND COCAINE
SEIZED AT THE TOLEDO STATION.

During November of 1971, a suitcase was taken to Toledo, Ohio and placed in the Union Terminal Station at Toledo, Ohio.

Defendant Capra was a part owner of that suitcase.⁴³ The affidavit of Detective George Eaton of October 18, 1972, (Exhibit "F" at page 3) concludes, (together with Detective Nauwens), that the defendant Capra has "implicated [him]self quite strongly in the possession, transfer and sale of several kilograms of heroin and cocaine and of conspiracy to commit those crimes" - at page 7. See also Detective Eaton's affidavit of February 15, 1973 annexed hereto as Exhibit "G". In those affidavits, the Government alleges Capra's interest in a suitcase left at the Toledo station. See also page 15 of the aforementioned affidavit where there is a tape recording in which the Government alleges Capra totally implicates himself in the possession of the aforementioned suitcase.

The Government further alleges through their indictment that Capra had an interest in the aforementioned suitcase.

That the aforementioned suitcase was opened on October 28, 1971 pursuant to state action in Toledo, Ohio, without the propriety of a search warrant nor consent of any proper party nor incident to a proper arrest.

That the defendant Capra did not relinquish his interest in the aforementioned suitcase and as a result of the acts

43. See Dellacava's affidavit of September 5, 1973 indicating that Capra was a part owner of that suitcase.

referred to above, he is an aggrieved individual under the Fourth Amendment of the United States Constitution and has standing to move to suppress the use of the illegally seized suitcase together with the fruits of the search that flowed therefrom or, alternatively, he moves to suppress the product of the opening of the suitcase.

It is further alleged that the instant case against John Capra is one where possession at the time of the contested search and seizure is an essential element of the offense charged. Nevertheless, his ownership at the time of the illegal search and seizure mandates that this Court grant a hearing pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure to determine the legality of the search and seizure of Toledo, Ohio and any evidence that was the product of said search and seizure. The defendant presses the fact that there was no legal basis, justification or excuse for the search and seizure in question.

Defendant Capra respectfully urges that an order be made ordering a hearing to suppress the evidence seized and that the Government be stopped from using said items in any criminal proceeding and the information gleaned therefrom.

V.

DUPLICITY

Count I of the indictment charges a continuing conspiracy from July 1969 through the date of the indictment to violate Section 4705(a) of Title 26, and Section 812 of Title 21.

Conspiracy to violate U.S.C. §4705 is punishable under 26 U.S.C. §7237 by a different penalty than a conspiracy to violate 18 U.S.C. §812.⁴⁴

Defendant moves to dismiss Count I of the indictment in that if he is so convicted, it will be impossible to determine for the purpose of punishment, upon what charge the jury convicted.⁴⁵ The defendant respectfully requests that Count I of ~~the~~ indictment be stricken and dismissed in order to avoid placing the defendant in the predicament (if convicted of facing a mandatory minimum sentence when in actuality the jury agreed upon his guilt pursuant to 18 U.S.C. §812). Alternatively, the Court may strike that section which, in the interests of justice, should not be contained in this indictment.⁴⁶

44. 26 U.S.C. §7237 - Allows punishment of not less nor more than 10 years imprisonment; 21 U.S.C. §841 allows imprisonment up to 15 years without any mandatory minimum.

45. Brown v. United States, 299 F.2d 438 (1962). See also United States v. Gibson, 310 F.2d 79 (2nd Cir. 1962).

46. In view of the fact that 26 U.S.C. §4705 has been repealed and 18 U.S.C. §812 sufficiently covers the punishment as related by 26 U.S.C. §7237, it is suggested (if the Court does not dismiss Count I), that the violation of 26 U.S.C. §4705 be stricken and excised from the indictment. It is also further suggested that the testimony with regard to this matter is essentially post-repealed of 26 U.S.C. §4705. We also urge the striking of Count II in the further interests of justice and proper due process.

VI.

SUPPLEMENTAL REQUESTS FOR PRODUCTION.

The defendant Capra respectfully requests that the Government be ordered to indicate what portions of tape recordings it intends to use at the trial and what portions of video tapes it intends to use at the trial.

It is further requested that the Court order the Government to contact the proper state authorities in [the five counties of] New York, [Nassau and Westchester] to determine whether there were any other wiretaps, transcriptions and logs with regard to the defendant Capra. [Specifically, Capra requests that the District Attorney of Westchester County be contacted in order that he may indicate to the Government whether any wiretaps in the home of John Capra were proposed, installed or Court ordered.]

[The defendant could only accomplish same upon a Court order and alternatively respectfully requests this Court to order District Attorneys of the five counties of New York, together with Nassau and Westchester to search their records to see whether there are any wiretap orders, tapes, logs, transcripts or proposed orders with regard to the defendant John Capra.]

[With regard to telephone number 247-2825, it is respectfully requested that the same order issue as to the transcripts and tape recordings that may be in the possession of the state authorities, in view of the fact that for the defendant to so request without a court order, it would be a vain act.⁴⁷] It

47. In two other matters that your deponent is familiar with, the United States Attorney's office in and for the Southern District of New York in United States v. Sperling and the Special Attorney of the Department of Justice in and for the District of New Jersey at Newark contacted the state officials and received the necessary taps and/or logs and/or transcripts.

is further requested that the informants - whom the Government has consented to allow defense counsel to interview be allowed to be subjected to psychiatric examination.

[Counsel further indicates to the Court that it has not yet received a transcript of the trial of Joachim Ramos in Toledo. Although this was the subject of pre-trial discussion in which the transcript of the trial of the principal informant of the Government was to have been received by the United States Attorney's office, to date counsel has no knowledge that it has been so received.

In view of the fact that the aforementioned transcript is extremely important as it is intertwined with the trial to be had - if necessary - the defendant Capra would respectfully request that he be given additional time to study the trial transcript and the preparation for trial.⁴⁸

48. Your deponent has been informed that defendant Guarino has sent a payment to Toledo for a copy of the aforementioned transcript some time during the month of May or June and to date, after much effort to obtain same, has not received the aforementioned transcript.

VII.

DEFENDANT CAPRA HEREBY REQUESTS A HEARING WITH REGARD TO ALL OF THE ABOVE MOTIONS THAT HE PLACES BEFORE THIS COURT - AND INCORPORATES BY REFERENCE AND ACCEPTS INTO THIS AFFIDAVIT ALL OF THE POINTS AS REFERRED TO IN HIS MEMORANDUM OF LAW, TOGETHER WITH THE CONTENTIONS, STATEMENTS AND POINTS RAISED BEFORE THIS MOST HONORABLE COURT BY HIS CO-CONSPIRATORS.

Defendant John Capra joins in the other applications of counsel to dismiss and to suppress.

WHEREFORE, it is respectfully requested:

- (a) that the indictment be dismissed;
- (b) that the motion to suppress as requested herein be granted as to all orders, warrants, wire recordings, conversations, and evidence received.


BARRY IVAN SLOTNICK

Sworn to before me this

5th day of September, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

JOHN CAPRA,

APPLICATION FOR
SEVERANCE

73 CR 460

Defendant.

COMES NOW defendant JOHN CAPRA, by and through his counsel, and hereby moves this Court for an order directing a severance and separate trial from each of the co-defendants in the above entitled action.

Defendant Capra alleges that, due to the significant points of law that he presses upon this Court and the prejudice that would flow by a joinder of the co-defendants for trial together, he requests a separate trial of this indictment. FRCP Rule 14.

The trial will contain statements of co-defendants (electronically recorded or otherwise) which would be of such a highly incriminating nature that no purpose could be served in causing the defendant Capra to stand trial together with all of the co-defendants - other than to prejudice and further taint the Government's case against the defendant Capra.

"... As there is no dispute but that such statements, ... were of a highly incriminating nature ... They were not only incriminating as to the defendant by whom made, but in the main, equally incriminating against other defendants. True, as the Government asserts, such statements were offered in evidence against the defendant by whom made, and the Court instructed the jury accordingly. A reading of these statements, however, leaves no room for doubt but that they were damaging not only as to the defendants against whom offered, but as to all others.

We doubt if it was within the realm of possibility for this jury to limit its consideration of the damaging effect of such statements merely to the defendant against whom they were admitted. We have equal doubt that any jury, or for that matter any court, could perform such a Herculean feat."

United States v. Haupt, 136 F.2d 661, 672 (7th Cir. 1943).

The defendant Capra further indicates that he has reason to believe that there will be a severe Bruton problem, 391 U.S. 123 (1968).

The defendant Capra further alleges that there has been misjoinder as to the Counts and the defendants.

It is contended that the trial will involve several conspiracies, different jurisdictions and diverse issues, all which will deny the defendant Capra his due process rights to a fair hearing. Also, it was improper to join the defendants whereby testimony may come in alleging offenses committed by others not involving defendant Capra and outside the conspiracy.

United States v. Spector, 326 F.2d 345, (7th Cir. 1963).

Furthermore, in view of the taint issue raised by Capra, he should be tried separately.

There may be many conflicts between and among the defendants including the question of testimony, witnesses and theory which mandates a severance. DeLuna v. United States, 308 F.2d 140, 141, 1 A.L.R.2d 969 (5th Cir., 1962), rehearing denied 324 F.2d 375 (1964).

If this application is denied, defendant respectfully requests to reserve his right to move again for this relief

as well as for all of the relief requested within these motion papers, together with any and all pertinent motions and applications to be made on behalf of the defendant Capra.

Respectfully submitted:

BARRY IVAN SLOTNICK
Attorney for Defendant JOHN CAPRA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK-----X
UNITED STATES OF AMERICA,

-against-

AFFIDAVIT

JOHN CAPRA,

73 CR 460

Defendant.
-----XSTATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

JOHN CAPRA, being duly sworn, deposes and says:

1. That I am the defendant in the above entitled action.

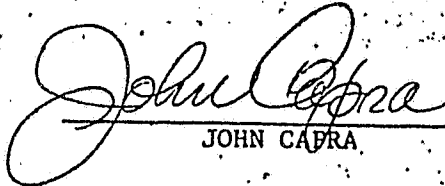
2. That I have fully discussed this matter with my attorney and have been informed that my voice has been intercepted and divulged on tape recordings within the possession of the Government as a result of electronic surveillance [of the Diane's Bar, Ray's Stationery, Steve's Air Conditioning, 1023 Havemeyer Avenue and Whitestone, Queens. (All referred to in the attached papers and memoranda herein, revealing my interest in Diane's Bar and Steve's Air Conditioning. I further allege that I was present at 1023 Havemeyer Avenue and the apartment in Whitestone, Queens during most of the "bugging" period. My participation at the aforementioned four establishments occurred during the pertinent periods of electronic surveillance.]

3. That I had no actual knowledge of, nor did I consent to any of the aforementioned interceptions of my voice; that I did not receive proper notice pursuant to the relevant Federal and State statutes of the electronic surveillance and overhearing of my voice; that I have been informed by my attorney that his

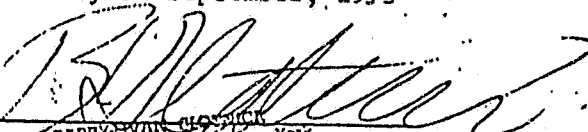
investigation has shown that my voice was picked up, overheard and transcribed during December of 1972 on at least three occasions at a time when I was not a named party on an eavesdropping warrant (and at a time when I was not talking to a named party on an eavesdropping warrant. When the Court ordered that only conversations of Joseph Della Valle with others should be recorded. My attorney has informed me that it is his belief that as a result of that eavesdropping, the Government discovered my identity and other leads which led to this prosecution. He has also indicated that this is probably the first time my voice was intercepted. I have no knowledge or recollection of ever having spoken to Joseph Della Valle on the telephone.

4. My attorney advises me that my First, Fourth, Fifth, Sixth and Ninth Amendment rights pursuant to the Constitution of the United States have been violated and that I have a right to move to suppress all of the evidence, both tangible and intangible that has been seized as the result of those violations.

5. I place this affidavit before the Court on behalf of my application to controvert and/or suppress all of the evidence seized as a result of the violations of my constitutional rights as heretofore stated.


JOHN CAPRA

Sworn to before me this
4th day of September, 1973


BARRY WINK
NOTARY PUBLIC, State of New York
No. 31-3709363
Qualified in New York County
Term Expires March 30, 1975

Reel 3A

A-44

Out Hello (female)
 In Hello is your Daddy in, FLEET?
 Out Yes
 In This is Stevie
 Out Hello
 In Hello John
 Out Yeah
 In How you feel?
 Out So - so
 In Hun?
 Out I just got in
 In Yeah, you probably didn't feel good last night you didn't
 Out come down at all
 In Mah I didn't come down at all
 Out You didn't sound good when I left you
 In No
 In I seen this fellow, you gonna come down tonight or what
 Out Which fellow?
 In before
 Out You know the guy we talk to the night we went home
 In Yeah, and whats what?
 Out Well, you know
 In He wants to see me?
 Out No, but a just a , ~~you don't have to~~ I'll
 In definitely see you tomorrow, though
 Out Yeah, tomorrow I definitely will
 In Alright
 Out No question
 In Alright
 Out Alright
 In Do what you say
 Out If I, you know, let me see, ~~YESSSSSS~~ alright
 In If
 Out I'll call you
 In Right good
 Out Alright?
 In Alright Pal
 Out Bye
 In So long

(N.P.)

December 16, 1971

15:45 Hours Incoming Call

Reel 3A

In Male

Out Male for(Steve)

In Mondo
 Out Hello is Leo there?
 In No o he a left
 Out When is he coming back, whose this Jimmy?
 In No, who ~~unaudible~~ this, (no word)
 Out The gray haired guy
 In Oh, no he a no he left, I expect him back
 Out Is his car there
 In Yeah
 Out Alright heres what you do
 In What?
 Out Tell that Steve says to meet him at six o'clock
 In Okay
 Out ~~YESSSSSS~~ Now wait, hold on, I'm with Steve now, hold on
 In Yeah six o'clock in the store
 Out Six o'clock in the store?
 In Over your place, yeah
 Out Right
 In Okay good
 Out Okay

In: Hello, in a moment please
 Out: In the afternoon, okay
 In: You'll be about 2 o'clock
 Out: Yeah 1-3 o'clock
 In: Alright because it's a holiday
 Out: Okay
 In: In case he calls me, and we have to work overtime, I'll
 call you back
 Out: Okay baby
 In: Okay baby
 Out: Yeah
 In: So long
 Out: Bye, bye

1971
 HRF
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 the
 ctio

Out call to 822-9005 In Steve Out Leo/John/Joe
 Out: Hello
 In: Hello, Can you give me Johnny Hooker, or Leo next door
 Out: Johnny Hooker?
 In: Or Leo, either one
 Out: Yeah, will you hold on?
 In: Certainly will
 Out: Okay
 In: Hello
 Out: Hello - Joe or John - difficult to discern sounds like
 In: Yeah
 In: Baseline
 The rest of the conversation previously transcribed

1971
 re

In Baseline Out Sissy
 In: Hello
 Out: Is Freddie there?
 In: No, he's not here
 Out: Oh thank you
 In: About this speaking?
 Out: Sissy
 In: Uh?
 Out: Sissy
 In: Sissy this is Baseline Out Yeah how are you Baseline?
 In: What are we gonna do with this money huh?
 Out: Huh?
 In: What are we gonna do with this money?
 Out: Didn't Freddie talk to you?
 In: Nobody, I seen nobody
 Out: He hasn't been around today?
 In: He hasn't been around 4 or 5 days
 Out: Does he at, do you know?
 In: I haven't the slightest idea

Machine was cut off at this point.

Out to 100,000

Unit 3

Out to 205-666-2510

Out Angelo "Fatso"

Operator for additional 20 cents
Drop the dime, I'll put in a quarter and a nickel
Hollo
Hollo
Hollo
Hollo
Hollo Fatso?
Yeah
You're terrific boy
I could do something
Yeah, I know, you know Angelo, if, believe me, I can't
even wish you dead
Good
Because if you do, I'll be in more trouble
Good
Come on, you want to call up that kid now
Who
Fritzio
He ain't got it
He told me he's got it, I was there before
Inaudible- somebody
Why don't you stop, you know I was supposed to go there
last night, I called him up and told him I was busy, I'll
be there this afternoon. You're, you're gonna make this
think I'm fucking around with him, now
Why? I mean what day is it?
What?
I mean, what day is it, that he can't wait a day?
Well today's Friday, you told me today, I told him last
I mean what day is it?
What do you mean?
I mean what day's, what do you mean, what do I mean? is
holiday is it?
Ah, I even told you yesterday, don't let me heard
Ah come on, people gotta do some things, that way, this
incredible, I was busy all day, I have to something, I
mean it gets ridiculous, I have to do something for
I had, oh, oh, now if Angelo's got it, he'll give it
to you, I'll call him
Alright
Hang up
In
Out
In
In

Thug Up

In Pacific:

A-67

Out

310

In

Out Hello
In Hello, how everything?
Out Okay fine
In By the way, there?
Out Yeah, just a minute
Out Hello
In Hello buddy, how are you coming?
Out How you doing?
In Alright
Out Yeah?
In Do you have the stuff yet?, do you have the stuff?
Out Yeah
In Huh?
Out Listen what happened, I waited for your phone call for days
In Incredible - no work to be done, I woulda called you
Out No work right
In No when am I gonna see you
Out What?
In You coming down tomorrow?
Out No things are quiet
In Huh, huh, cause well I figured you, I thought you could come and work with me, but things slowed up over here so, so when do I see you
Out Well I'll see tomorrow in the afternoon and see what happens
In Alright about 3
Out Yeah
In Okay buddy., so long
Out Bye

Dec. 27, 1974
2025 hours
Incoming call

In Steve

Out Joe

John Capra



In Hello
Out Hello
In Where this?
Out Who do you think it is?
In Huh my best today
Out Did you go see a, what his name? Our friend
In Yeah, yesterday
Out He didn't have no Christmas presents?
In Huh
Out Didn't you say he had a present for us? Didn't you tell me that?
In I said that to you?
Out Yeah
In The one that I delivered the other night?
Out Yeah you know, to the old guy, didn't you tell
In Oh, yeah, yeah, yeah, yeah, yeah, yeah, you, you
Out Huh?
In Yeah but I gotta go back there
Out Alright then I'll be up here, see what happens, alright?
In I'll give him a call
Out Alright I'll be up here
In Alright
Out Okay
In I'll ask for you over there
Out yeah
In Okay
Out Bye, bye In so long

LOG HAS UNK MALS

A-68

WIRE TAP 49

CASE 14 / 72

AUGUST 29, 1972

1000 hours

INCOMING CALL

Inside Joe Gernie

Outside Elliot WALES

In Hello

Out Hello Joe, Elliot Wales.

In Yeah

Out Had no decisions yet, so don't worry

In Oh boy. What a system. ---- (inaudible)

Out Yeah--- Well its quite the time now you know.

In Yeah.

Out Its about the time now, about six weeks.

In Must be vacations.

Out Yeah---We'll keep our fingers crossed. Yeah, when am I gonna see you ?

In I don't know.-----I got a little hope for you this weekend.

Out OK, good.

In Trying real hard, in fact, I was hoping this was it. I was hoping that this call was it.

Out Oh really ? Lets hope the next call is it.

In A'right pal-----take care-----

END OF CONVERSATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

-against-

AFFIDAVIT

JOHN CAPRA, STEVEN DELLA CAVA, and
LEOLUCA GUARINO,

73 CR. 460

Defendants.

-----X

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

PATRICK GUARINO, being duly sworn, deposes and says:

1. That he presents this affidavit to the Court on behalf of the defendants CAPRA, GUARINO and DELLA CAVA with regard to the "minimization hearing" heretofore held.

2. That the Government has presented exhibits " " and " " with regard to all calls that were captured in full as to (a) "Beans"; and (b) "others".

3. That pursuant to the Court's suggestion, counsel has undertaken to verify the presentation of the Government with regard to the above named exhibits.

4. Counsel finds that his effort has disclosed great discrepancies as to the accuracy of the Government's exhibits - apparently one of the problems is the fact that there are overlapping boxes, for example, a 30 second call could be put in the "0-30"

box or the "30-60" box; similarly, with regard to a minute call, a two minute call and a three minute call. The various officers may have indicated in their scratch notes where they were putting in the "concurrent" calls - we have no idea how this was made up. It is apparent that the Government's time sheet has less value - if any.

Even disregarding the above mentioned, the defendants contest the accuracy of the Government's exhibits based upon their sampling - i.e. taking Reel 5.

I. "OTHERS" - EXHIBIT " "

REEL 5

	<u>Government's Figures</u>	<u>Defendants' Figures</u>	
		<u>Complete</u>	<u>Incomplete</u>
0-30	4	3	0
30-60	3	3	0
1-2 minutes	3	2	0
2-3 minutes	3	3	0
3 minutes & over	0	2	0

II. "BEANS" - EXHIBIT " "REEL 5

	<u>Government's Figures</u>	<u>Defendants' Figures</u>	
		<u>Complete</u>	<u>Incompl.</u>
0-30	4	3	0
30-60	3	3	0
1-2 minutes	3	2	0
2-3 minutes	3	3	0
3 minutes & over	0	2	0

III. BEANS - *-Incomplete Calls

REEL 6

0-30	4	1
30-60	8	8
1-2 minutes	2	1* + 2
2-3 minutes	1	0
3 minutes & over	1	1* + 1

REEL 7

0-30	4	1
30-60	5	1* + 6
1-2 minutes	3	1* + 4
2-3 minutes	1	2 + 1*
3 minutes & over	1	1

REEL 8

0-30	0	0
30-60	0	0
1-2 minutes	0	0
2-3 minutes	0	0

REEL 8

3 minutes & over

0

0

REEL 9

	<u>0-30</u>	<u>30-60</u>	<u>1-2 min.</u>	<u>2-3 min.</u>	<u>3 min. & over</u>
Defendants	1* + 4	7	4	1	2
Government	10	6	2	2	2

REEL 10

Defendants	5	2	4	0	0
Government	8	4	7	0	0

REEL 11

Defendants	3	5	5	1	0
Government	6	12	3	2	0

REEL 12

Defendants	5	5	6	0	1
Government	11	5	3	1	0

REEL 13

Defendants	1*+10	9	6	5	0
Government	6	6	3	6	1

REEL 14

Defendants	3	1	6	1	1
Government	7	1	9	0	1

REEL 15

Defendants	5	4	7	3	3
Government	6	10	9	1	3

REEL 16

Defendants	1	3	3	1	1
Government	1	0	1	1	3

5. A perusal of the above shows such a great disparity as to cast doubt upon the accuracy of the Governments' figures.

6. It is further contended that with so many people working on the tape recordings, together with the failure of the production of the statistical compilation, the result is an exhibit which should have no deep meaning to this Court.

7. It is further contended that the Government's exhibits contain only the "completed" calls.

8. Defendants contend that a statistical analysis of the "completed" calls would be insufficient as incomplete calls are not necessarily minimized telephone calls.

9. This affidavit is submitted to the Court so that it may properly appraise and review the Government's exhibit in the light of the defendants' allegations that it is inaccurate and incomplete.

10. The facts set forth in this affidavit are based on my listening to tape recordings of Diane's Bar reflecting electronic surveillance of telephone number 722-9595 between the 20th day of December 1971 and February 3, 1972.

11. All of the recorded and logged telephone conversations to and from Steven Della Cava were monitored by me and all of these conversations were specifically examined with respect to the length of the conversation, and the person to whom Della Cava was speaking. Particular attention was given to the minimization, if any, of all conversations of Steven Della Cava during the aforesaid period of time.

12. Attached hereto is a complete list of all Della Cava conversations monitored as indicated above listed on a day by day basis with the time of the call corresponding to that which is set forth in the logs submitted by the Government, together with the designation by the officer of the call as non-pertinent by an "NP".

13. An analysis of Exhibit "A" ^X ⁶ was made by your deponent which sets forth statistics relevant to the lack of minimization standards practiced by the monitoring officer.

DECEMBER 20, 1971 - JANUARY 6, 1972

14. A total of forty-six (46) telephone calls were made and received by Steven Della Cava. (All of these calls are included in Exhibit ^{made - A-B to the investigation} "A" attached hereto). Thirty-two (32) of these calls were designated in the logs as not pertinent ("NP") by Detective Eaton. Of the total, four (4) non-pertinent calls were with his son; two (2) non-pertinent calls were with his wife; twelve (12) non-pertinent calls were with his girlfriend; one (1) non-pertinent call was with his daughter; and one (1) non-pertinent call was with his lawyer. Twenty (20) calls of the forty-six (46) were of the aforesaid variety.

15. Thirteen (13) of the twenty (20) calls exceeded one and one-half (1-1/2) minutes. One (1) of the thirteen (13) calls with his attorney exceeded three (3) minutes.

16. The monitoring officers recorded and logged in their entirety all forty-six (46) calls which number includes the thirty-two (32) non-pertinent calls made by and to Steven

Della Cava with the exception of the following:

(a) December 22, 1971, a non-pertinent call to attorney monitored and recorded for three (3) minutes seven (7) seconds before machine turned off.

(b) December 24, 1971, non-pertinent conversation with a 4 or 5 year old child monitored and recorded for one minute and six seconds before machine turned off.

(c) December 28, two (2) non-pertinent conversations with Della Cava's girlfriend Jean monitored and recorded for one (1) minute and one (1) second and two (2) minutes respectively before machine turned off.

(d) December 30, one (1) non-pertinent conversation with Della Cava's girlfriend monitored and recorded for forty (40) seconds before machine turned off.

JANUARY 6, 1972 - FEBRUARY 3, 1972

17. A total of 144 calls were made and received by Steven Della Cava.

18. One hundred and eight of the calls were designated in the logs as not pertinent (NP) by Detective Eaton.

19. Eleven (11) non-pertinent calls were with his son; seventeen (17) non-pertinent calls were with his wife; thirty-one (31) non-pertinent calls were with his girlfriend; one (1) non-pertinent call was with his mother. A total of sixty (60) non-pertinent calls relative to Della Cava's personal life and family.

20. Thirty-six (36) of the sixty (60) personal-family type calls exceeded one (1) minute and a half.

THE MONITORING OFFICERS RECORDED AND
LOGGED ALL ONE HUNDRED AND FORTY FOUR
CALLS, WHICH NUMBER INCLUDED ONE HUNDRED
AND EIGHT NON-PERTINENT CALLS WITH THE
EXCEPTION OF THE FOLLOWING:

(a) January 10, 1972, two (2) non-pertinent calls to his girlfriend turned off after one (1) minute and fifteen (15) seconds respectively.

(b) January 13, 1972, a non-pertinent call to a female turned off after twenty-eight (28) seconds.

(c) January 24 and 27, 1972 - Calls to girlfriend turned off after six (6) minutes and twenty-seven (27) seconds respectively.

21. Annexed hereto as Exhibit "A" is the defendants' contention of lack of minimization with regard to the reels of Diane's Bar I and II not played for the Court during the minimization hearing. It becomes apparent that improper and non-minimization (so as to violate the statute and the Fourth Amendment) activities occurred.
Sworn to before me this
9th day of October, 1973

PATRICK GUARINO

EXHIBIT "A"

<u>Date</u>	<u>Time in Log</u> <u>Reel 6A</u>	<u>Participants</u> <u>Conversation Between</u> <u>In</u> <u>Out</u>	<u>Length of</u> <u>Conversa-</u> <u>tion</u>	<u>Pertinen</u> <u>or</u> <u>Non-Pertin</u>	
12/22/71	2112	Male	Female	1 min. 17 sec.	Cut
	2145	Beansie	Female	53 Sec.	NP
		for Michael Santangelo			
	2150	Beansie	Michael Santangelo	3 min.7 sec.	A/C NP
12/23/71	0035	Beansie	Female	3 min.	NP
12/24/71	1908	Beansie	Female	1 min.6 sec.	NP
	2025	Male	Shrimpy	2 min.33 sec.	NP
12/28/71	1720	Sleepy	Artie	1.50 sec.	NP
	1840	Phil	Bill	1.52 sec.	NP Cut
12/29/71	1420	Frank	Wife	1 min.	NP
	1430	Mondo	Female	45 sec.	Hang up
	1824	Male	Male	55 sec.	NP
		(Beans)	(Carmine)		
	1825	Stevie	Wife	1.5 sec.	NP Hang
	1932	Freddie	Male	2.25 sec.	NP Cut
	1940	Steve	Gene	2.40 sec.	NP
	1955	Steve	Male	2.25 sec.	NP
	2000	Joey	Female	2 min.	NP
	2300	Steve	Female	7.55 sec.	NP
1/4/72	1718	Freddie	Natalie	1.55 Sec.	Min
1/5/72	1510	Freddie	Natalie	2.40 sec.	NP NFM
	1710	Male/Freddie	Male	2.22 sec.	NP NFM
1/6/72	1435	Male	Female	1.45 sec.	NFM
	1509	Male	Schacter	3.35 sec.	NP NFM
	1510	Freddie	Joe	3.15 sec.	NP
	1522	Freddie	Joe	1.15 sec.	NP
	1744	Beans	Jean	2.10 sec.	NFM
	1840	Male (Beans)	Female (Jean)	1.25 sec.	NM
	1844 or 1854	Male	Female	2.10 sec.	NM
	2120	Della Cava	Child/Jean	1.5 sec.	In logs
		(Beans)			
1/7/72	1207	Beans	Angelo	33 sec.	EP
	1440	Sam	Schacter	2.50 sec.	NP
	2134	Beans	Female/Jean	3.30 sec.	NP
	2143	Pete	John	1.30 sec.	NP
1/9/72	1355	Beans	Jean	2.12 sec.	NP
	1424	Male	Female	2.30 sec.	NP
1/11/72	1321	Male	Angelo	1.57 sec.	NP
	1410	Male	Female	1.20 sec.	NP
	1414	Male	Female	1.24 sec.	NP
	1531	Joe Bones	Fran	2.10 sec.	NP
	1537	Male	Joan	4.08 sec.	NP
	Between	Jimmy		6.39 sec.	
	1600-1605				

EXHIBIT "A"

<u>Date</u>	<u>Time in Log</u> <u>Reel 6A</u>	<u>Participants</u> <u>Conversation Between</u>		<u>Length of</u> <u>Conversa-</u> <u>tion</u>	<u>2.</u> <u>Pertine</u> <u>or</u> <u>Non-Pertin</u>
		<u>In</u>	<u>Out</u>		
1/11/72	1833	Beans	Jean	1.05 sec.	NP
	1831	Freddie	Male	2.30 sec.	NP
	1855	Marilyn	Male	1.35 sec.	NP
	1703	Female	Female	1.10 sec.	NP
	1937	Dom	Female	.58 sec.	NP
1/12/72	1532	Male	Dennis	.58 sec.	NP
	1554	Male	Female	1.21 sec.	NP
	1615	Freddie	Sam	.51 sec.	-
	1806	Freddie	Female	2.01 sec.	NP
	1807	Beans	Jean	.45 sec.	NP
	1834	Beans Daughter/Wife		1.30 sec.	NP
	1838	Beans	Male	.45 sec.	NP
	1905	Dom	Wife	2.24 sec.	NP
	1910	Beans	Male	1.09 sec.	
	1915	Beans	Carmine	1.05 sec.	NP
	1928	Female	Female	.41 sec.	NP
	1435	Fred	Pete	.42 sec.	NP
	1440	Fred	Angelo	1.20 sec.	
	1550	Josie	Petey	1.05 sec.	NP
	1722	Male	Female	1.36 sec.	NP
1/13/72	1738	Male	Female	2.32 sec.	NP
	1835	Beans	Male	1.40 sec.	NP
	1851	Beans Margaret/Wife		.44 sec.	NP
	1937	Beans	Male	.53 sec.	NP
	1943	Dom	Female	.52 sec.	NP
	2013	Jimmy	Female	.45 sec.	NP
	2135	Beans	Jean	2.58 sec.	NP
	2147	Beans	Male	1.15 sec.	NP
	1633	Sam	Female	3.40 sec.	NP M/O
	1754	Male	Male	1.05 sec.	NP
	1812	Female	Female	.52 sec.	NP
	1829	Beans	Female	1.07 sec.	NP
	1842	Beans Female/Wife		1.15 sec.	NP
	1903	Dom	Male	1.52 sec.	NP
1/14/72	1908	Dom	Male	.40 sec.	NP
	1910	Beans	Son	.30 sec.	NP
	1931	Beans	Female	.60 sec.	NP
		Beans	Shad	.40 sec.	NP

EXHIBIT "A"

<u>Date</u>	<u>Time in Log</u> <u>Reel 6A</u>	<u>Participants</u> <u>Conversation Between</u>		<u>Length of</u> <u>Conversa-</u> <u>tion</u>	<u>3.</u> <u>Pertinent or</u> <u>Non-</u> <u>Pertinent</u>
		<u>In</u>	<u>Out</u>		
1/15/72	1225	Male	Male	1.15 sec.	NP
	1605	Jim	Female	1.50 sec.	NP
	1630	Male	Alex	5.37 sec.	
1/16/72	1621	Beans	Female	.30 sec.	-
	1650	Beans	Wife	.38 sec.	NP
	1927	Jimmy	Male	2.49 sec.	NP
	1957	Beans	Girlfriend	1.50 sec.	NP
<u>Machine accidentally left on two (2) hours - 1445-1650 All NP</u>					
1/17/72	1318	Male	Carmine	.50 sec.	NP
	1325	Sam	Charlie/Freddie	1.55 sec.	-
	1341	Sam	Nat'l. Airlines	7.55 sec.	-
	1406	Sam	Mr. Spring	3.57 sec.	-
	1450	Sam	Al Schecter	3.08 sec.	-
	1741	Male	Female	1.10 sec.	NP
	1833	Jimmy	Patsy	1.05 sec.	NP
	1839	Beans	Carmine & Wife	1.10 sec.	-
	1914	Sam	Female	1.10 sec.	NP
	1954	Male	Female	1.20 sec.	NP
1/18/72	1718	Male	Male/Mr. Murphy	1.25 sec.	-
		(Sam)			
	1830	Beans	Wife	1.11 sec.	NP
	1900	Freddie	John	1.55 sec.	NP
	1949	Carmine	Alice	1.35 sec.	-
	2000	Male	Male	1.01 sec.	NP
	2037	Sam	Female	1.10 sec.	-
	2330	Shadow	Beans	1.05 sec.	-
1/19/72	1428	Sam	Freddie	1.45 sec.	-
	1505	Sam	Female	.25 sec.	-
	1530	Sam	Schacter	2.05 sec.	-
	1612	Female	Female	.25 sec.	NP
	1655	Sam	Female	1.45 sec.	-
	1754	Beans	Male	.27 sec.	NP
	1813	Beans	Jean	.40 sec.	NP
	1830	Sam	Joe	1.25 sec.	NP
	1837	Beans	Son & Wife	1.31 sec.	NP
	1900	Sam	Hotel	1.15 sec.	-
	1911	Josie/Beans	Tom Lane	.59 sec.	NP
	2040	Beans	Male	.27 sec.	NP

EXHIBIT "A"

4.

<u>Date</u>	<u>Time in Log</u> <u>Reel 6A</u>	<u>Participants</u> <u>Conversation Between</u> <u>In</u> <u>Out</u>	<u>Length of</u> <u>Conversa-</u> <u>tion</u>	<u>Pertinent o</u> <u>Non-</u> <u>Pertinent</u>	
1/20/72	1511	Freddie Al	3.20 sec.	-	
	1525	Freddie Bondsman	2.57 sec.	-	
	1735	Freddie Gino & Al Newman	3.20 sec.	NP	
	1820	Freddie Male	.44 sec.	NP	
	1825	Beans Female	.57 sec.	NP	
	1827	Freddie Sam's Wife	4.31 sec.	NP	
	1857	Beans Male (Carmine, Son & Wife)	1.47 sec.	NP	
	1902	Frank Male	2.15 sec.	NP	
	1925	Female Male	.44 sec.	NP	
	1945	Joe Z. Carmine	1.46 sec.	NP	
	2059	Male Female	1.07 sec.	NP	
	2200	Beans Jean	1.57 sec.	NP	
	1/21/72	1705	Sammy Locksmith	1.41 sec.	M/O
		1940	Shorty Male	1.27 sec.	-
2153		Beans Jean	2 min.	-	
1/22/72	1700	Freddie Male	1.30 sec.	-	
	1750	Beans Jean	.53 sec.	NP	
	1810	Beans Female(Wife)	2.02 sec.	NP	
	2022	Beans Jean	.58 sec.	-	
	2115	Beans Male	1.40 sec.	NP	
	2130	Beans Female (Jean)	2.05 sec.	NP	
	2340	Beans Girlfriend	2.10 sec.	NP	
	1/24/72	1437	Sam Joe	1.07 sec.	NP
1645		Male Female	2.52 sec.	NP M/O	
1801		Beans Female(Wife)	2.27 sec.	NP	
1833		Male Tommy	2.09 sec.	NP	
1905		Male Female	2 min.	NP M/O	
1/25/72		1507	Sam Schacter	8.26 sec.	-
	1603	Sam Murray	4.05 sec.	-	
	1820	Shorty Son	1.21 sec.	NP	
	1830	Beans Jean	.50 sec.	NP	
	Between 1835 & 1852	Beans Wife	1.43 sec.	Not logged	
	1912	Shorty Female	2.26 sec.		
	2000	Dominick Female	1.30 sec.		
	2005	Male Male	.50 sec.	NP	
	1/26/72	1608	Shorty Ralph	.54 sec.	NP
		1711	Sam Female	2.07 sec.	NP
1813		Beans Jean	1.28 sec.	NP	

EXHIBIT "A"

5.

<u>Date</u>	<u>Time in Log</u> <u>Reel 6A</u>	<u>Participants</u> <u>Conversation Between</u> <u>In</u> <u>Out</u>	<u>Length of</u> <u>Conversa-</u> <u>tion</u>	<u>Pertinent or</u> <u>Non-</u> <u>Pertinent</u>
1/26/72	1819	Freddie Sister	1.28 sec.	-
	1850	Beans Female(Wife)	1.15 sec.	NP
	1950	Beans Jean	1.19 sec.	NP
	2006	Dom Female	2.25 sec.	-
	2020	Ralph Male	2.50 sec.	NP
	2120	Male Female	.53 sec.	NP
	2125	Beans Jean	5.15 sec.	NP
1/27/72	1818	Blackie Donnie	8.30 sec.	NP
	1830	Beans Jean	2.01 sec.	NP
	1840	Beans Female(Daughter)	1.35 sec.	NP
	1846	Beans Wife	1.25 sec.	-
	2023	Dom Female	7.49 sec.	NP
	2058	Freddie Operator	7 min.	-
	2145	Pete Male	1.29 sec.	NP
	2155	Beans Jean	2.34 sec.	NP
	2250	Female Female	1.27 sec.	NP
1/28/72	NONE			
2/2/72	1705	Sam Girlfriend	2.20 sec.	NP
	2110	Beans Jean	3.07 sec.	-
2/3/72	2220	Shorty Female	1.23 sec.	
	1435	Jimmy Wife	1.25 sec.	NP
	1845	Male Male	1.07 sec.	NP
	1850	Joey Beans Wife	2.35 sec.	NP
	1855	Fred Female	1.04 sec.	NP
	1920	Angelo Joe	2.15 sec.	NP
	1927	Male Male	.55 sec.	
	2023	Dom Brother	2.50 sec.	

APPENDIX A and BSTEVEN DELLA CAVADecember 20, 1971

Reel 5A	1437	Beans-Helen	.13	NP
	1801	Son	.30	NP
	1824	Freddie	.48	
	2112	Jean (Girlfriend)	.38	NP

December 21, 1971

1520	Jean (Girlfriend)	.06	NP
2027	Unk	.42	
2115	Female	2.17	NP
2210	Unk Male	1.34	
2230	Male	2.41	NP
0021	Jean (Girlfriend)	4.37	NP

December 22, 1971

1225	Female	1.26	NP	
1210	Leo	3.00		
1816	Unk - Male	.26	NP	
Reel 6A	2145	Female - Wife of Attorney	.55	
	2150	Attorney Santiago	3.07	M/O

December 23, 1971

1820	Male	.55	NP
1830	Male	4.14	
1954	Sam	.30	NP
0030	Mike	.45	NP
0035	Female	.55	NP

December 24, 1971

1800	Daughter-Wife	1.28	NP
1801	Tony	1.34	
1838	Carmine (Son)	.50	NP
1908	Child	1.06	NP M/O
2200	Piccolo	.27	NP

December 27, 1971

1815	Male	.30	
1920	Wife	.40	NP

Reel 7A December 28, 1971

M/O 1835	Jean (Girlfriend)	1.01	NP
M/O 2100	Jean (Girlfriend)	2.00	NP
1855	Carminc (Son)	1.23	NP

December 29, 1971

1829	Wife	1.05	NP
1850	Male	.40	
1825	Son	.45	NP
1940	Jean (Girlfriend)	2.35	NP
1955	Male	2.18	NP
2005	Unk Fem.	1.05	NP
2025	Unk. Male	.30	
2040	Child	.45	
2045	Peter	.05	
2230	Unk. Male	.55	
2300	Female	7.50	NP

December 30, 1971

M/O 1220	Jean (Girlfriend)	.40	NP
1300	Pete	Machine did not start - .30 ^s	

January 6, 1972

Reel 9 1744	Jean	2.10	NP
1840	Jean	1.25	NP
2120	Child & Jean	1.05	NP

(JEAN AND GIRLFRIEND ARE THE SAME PERSON)

January 7, 1972

1207	Angela	.33	
1821	Male		NP
1823	Petey		
1830	Female	.20	NP
1834	Female (Wife)	.45	NP
1840	Carminc (Son)	?	NP
1843	Jack		
2134	Jean - Female	3.23	NP

Reel 11AJanuary 8, 1972

1824	Female	?	NP
1826	Female	?	NP
1912	Female	?	NP

January 9, 1972

1355	Jean	?	
1523	Jean	4.10	NP
1548	Female (Wife)	.55	NP
2022	Female (Jean)	1.48	NP
2105	Female	?	NP
2114	Male	?	NP

January 10, 1972

	1800	Carmine (Son)		NP
M/O	1815	Jean	.15	NP
	1845	Happy	.30	
M/O	1848	Son	1.00	NP
	1925	Male	.35	
M/O	1945	Female	.10	NP

January 11, 1972

1705	Female (Mother)	.18	NP
1825	Carmine (Son)	1.01	NP
1833	Female (Jean)	1.05	NP
1940	Male	.23	

January 12, 1972

Reel 10A	1807	Jean	.45	NP
	1824	Male	.20	NP
	1834	Wife	1.30	NP
	1838	Male	.45	NP
	1849	Female	.20	NP
	1910	Male	1.07	NP
	1912	Male	1.09	NP
	1915	Carmine (Son)	1.05	NP
	1944	Female	.08	NP
	1951	Male	.28	NP
	2027	Male	.07	NP

Reel 11AJanuary 13, 1972

M/O	1824	Female	.28	NP
	1835	Male	1.40	
	1937	Male	.53	
	1944	Male	.45	
	2135	Jean	2.58	NP

Reel 11A January 13, 1972

2145	Male	.27	
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January 14, 1972

1829	Female	1.07	NP
1842	Wife	1.15	NP
1848	Male	.55	
1910	Son	.30	NP
1931	Female	.60	
1937	Shorty	.40	NP
1952	Female	.14	NP

January 15, 1972

1228	Male	1.15	
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Reel 12A January 16, 1972CALLS RECORDED AUTOMATIC

1.	Female	1.48	NP
2.	Son	1.14	NP
3.	Son	.15	NP
4.	Female	3.17	NP
1525	Female	.30	NP
1621	Wife	.30	NP
1650	Wife	.38	NP
2006	Pete	.18	NP
2055	Male	.14	NP
1957	Girlfriend (Jean)	1.50	NP

January 17, 1972

1802	Jean	.38	NP
1825	Male	.12	
1831	Male	.22	
1839	Son	1.10	NP

January 18, 1972

1812	Male	.37	
1830	Wife	1.10	NP
2330	Shadow	1.05	

Reel 13AJanuary 19, 1972

1927	Male	.36	NP
1754	Male	.27	NP
1813	Jean	.40	NP
1837	Son & Wife	1.31	NP
1854	Male	1.02	
1937	John	.36	
1911	Tom	.59	NP
2010	Jean	.10	NP
2040	Male	.27	NP

January 20, 1972

1856	Male	.34	
1857	Son	1.47	NP
1900	Female	.12	NP
2200	Jean	1.57	NP
2209	Female	.07	NP
2220	Finsky	.28	

January 21, 1972

1658	Male	.47	
2103	Female	.25	NP
2105	Male	.44	
2128	Jack	1.55	
2153	Jean	2.00	NP
2200	George Firel	.07	NP

January 22, 1972

1750	Female (Jean)	.53	NP
1810	Wife - Female	2.02	NP

January 23, 1972

2022	Jean	.58	NP
2115	Male	1.40	NP
2130	Female	2.05	NP
2340	Jean	2.10	NP

January 24, 1972

M/O	1345	Male	.18	NP
	1748	Jean	.06	NP
	1801	Wife	2.27	NP
	1804	Male	.18	NP

Reel 14A January 25, 1972

1852	Wife (John)	1.43	NP
1953	Male	.30	
2014	Ricky	.24	NP

Reel 14A January 26, 1972

1813	Jean	1.28	NP
1850	Wife	1.15	NP
1950	Jean	1.19	NP
2125	Jean	5.15	NP
2035	Male		

January 27, 1972February 2, 1972

1830	Jean	2.01	NP
1840	Daughter	1.35	NP
1848	Female/John	1.37	
M/O 2205	Jean	.27	NP
2301	February 3, John	.26	

Reel 15A January 28, 1972

2105	Leo		
1810	Jean (Girlfriend)	.45	NP
1811	Wife	2.03	NP
1830	John	.32	
2035	Son	3.43	NP

January 29, 1972

1810	Female	.40	NP
1840	Female	1.20	NP
1910	Tommy	1.20	
1925	Female	6.05	NP
1940	Male	.22	NP
2030	Jean	1.56	NP
2036	Mike	2.00	NP
2055	John	1.05	
2135	Jean	5.35	NP
2200	Tommy	.29	NP

January 30, 1972

1453	Male	.23	NP
1508	Female	.28	NP
1523	Female	2.26	NP
1715	Wife	1.05	NP
1730	Female	1.13	NP

January 31, 1972

1812	Male (John)	.28	
1817	John	.48	
1825	Wife	1.35	NP

Reel 16A February 1, 1972

1810	Jean	1.30	NP
1847	Jean	.53	NP
1850	Wife	1.12	NP
2033	Female	.19	NP
2035	Male	.44	

February 2, 1972

2105	Jack	1.03	
2110	Jean	3.07	NP

February 3, 1972

2016	Joey	.55	
2105	Leo	2.00	
2049	Female		

October 10, 1973

Honorable Marvin E. Frankel
United States District Court
Southern District of New York
United States Court House
Foley Square
New York, New York

Re: UNITED STATES OF AMERICA
v. JOHN CAPRA, et al.

73 CR. 460

Honorable Sir:

On October 9, 1973, service of an "affidavit, exhibit, appendix and memorandum" with regard to the 'minimization hearing' was made upon the Court and the Office of the United States Attorney.

We wish to indicate that, inadvertently, Paragraphs "13" and "14" of the Patrick Guarino affidavit referred to Exhibit "A". In place and in stead thereof, the reference should be to "appendix A and B" attached hereto.

HONORABLE MARVIN E. FRANKEL
JOSEPH W. HUGHES
ROBERT J. LITVIN
JAMES C. O'NEILL
JAMES J. YERGEN
HAROLD E. ZIMMER
BARRY IVAN SLOTNICK

Respectfully submitted,

RECEIVED 2-23-80

OFF. GEN. COUN.

2000 1210

BARRY IVAN SLOTNICK
On Behalf of All Defendants

BIS:ab
encl.

CC: Honorable Paul Curran
United States Attorney
for the Southern Dist. of New York
Attn: Lawrence Feld, Esq.

At a Trial Term of the United States District Court in and for the Southern District of New York, held at the United States Court House located at Foley Square, New York, New York on the day of September, 1973.

P R E S E N T :

H O N. MARVIN E. FRANKEL

U. S. D. J.

UNITED STATES OF AMERICA,

-against-

PETITION

JOHN CAPRA, STEPHEN DELLA CAVA and
LEOLUCA GUARINO,

73 CR. 460

Defendants.

TO THE WARDEN, GREEN HAVEN CORRECTIONAL INSTITUTION,
STORMVILLE, NEW YORK

WE COMMAND YOU, that you have the body of MICHAEL CASSESE detained in your jurisdiction at the Green Haven Correctional Institution, Stormville, New York under safe and secure conduct, before the Honorable Marvin E. Frankel, United States District Judge, Southern District of New York, 40 Foley Square, New York, New York, Room 318 on the 2nd day of October, 1973 at 10:00 o'clock in the forenoon then and there to testify as a witness in a certain criminal action in the said United States District Court between the United States of America and the above captioned defendants charged with conspiracy in relation to narcotics and various substantive narcotics offenses in violation of Federal law, and that you safely return the said MICHAEL CASSESE to his place of confinement immediately upon the conclusion of his testimony in said action and have you there

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this writ.

Dated: New York, New York
September 27, 1973

Witness

Judge of the United States
District Court

By the Court:

Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

-against-

AFFIDAVIT

73 CR. 460

JOHN CAPRA, STEPHEN DELLA CAVA and
LEOLUCA GUARINO,

Defendants.

-----X

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

DENNIS McALEVY, being duly sworn, deposes and says that:

1. I am counsel for the defendant LEOLUCA GUARINO and I make this affidavit in support of such defendant's application for the Court to issue out a writ of habeas corpus ad testificandum to be served upon the Warden of Green Haven Prison at Stormville, New York to deliver up the person of MICHAEL CASSESE.

2. Upon information and belief, MICHAEL CASSESE is presently detained at the aforementioned institution under a judgment of conviction for possession and sale of narcotic drugs having been convicted in the Supreme Court of the State of New York, County of Nassau. Upon such conviction, he was sentenced to an indeterminate term of up to seven (7) years by a Judge of the Supreme Court of Nassau County.

3. The relevance and necessity for the testimony of MICHAEL CASSESE at the instant trial emerges from the following facts: The affidavit of Detective Eaton, sworn to in support of the first wiretap order upon the pay telephone at Diane's Bar, contains allegations that Detective Eaton's informant was an individual established as previously reliable through his

alleged activities as an informant in connection with "the arrest of five individuals for possession and/or sale of substantial quantities of heroin, and the conviction of a major narcotics violator for possession of a loaded weapon as a felony", (Eaton affidavit dtd. 12/8/71).

4. At the recent trial of Nicholas Cuccinello in this Court, it was established that the arrests described in the above paragraph involved MICHAEL CASSESE, three other members of his family and Herbert Sperling. It was also established at the Cuccinello trial that there was no informant in that case who precipitated the arrests there in question. The testimony at the Cuccinello trial established that the arrests of the Casseses, and Donald Bodie did cause one of these persons to become an informant. While the Government, in Cuccinello, would not acknowledge which of the aforementioned defendants in that case became an informant, it did explicitly concede that the person who did ultimately become an informant was either Donald Bodie or Michael Cassese.

5. Michael Cassese, as above indicated, is serving a substantial jail sentence in state prison as a result of his narcotics activities. On information and belief, he was not the informant who turned in the Government's favor after his arrest. We are reliably informed that that late turning informant was Donald Bodie who, significantly, escaped any jail sentence in connection with his narcotics arrest as above described.

6. We are confident that, if Michael Cassese is produced, he will testify that the arrests referred to by Detective Eaton on Page 2 of his affidavit dated December 12, 1971 in fact

describe the case in which he, Donald Bodie and others were arrested; that he was not an informant in that case and that the informant in that case - who became such after his arrest - was Donald Bodie. Once it is established by the defense in the instant case that Donald Bodie was the informant described in Detective Eaton's affidavit as aforesaid, it will become immediately apparent that Bodie was not an informant who precipitated the arrests in the Cassese case, but that he became an informant, only after his own arrest in such case.

7. From all of the foregoing, it will clearly appear to the Court that Detective Eaton's alleged informant who reliably produced the Cassese arrests was actually not an informant in that case - but became one only after he, Cassese and others were arrested in or about April 20, 1971.

8. Detective Eaton's December 8, 1971 affidavit, which depends so heavily upon allegations regarding his alleged reliable informant may be shown through the testimony of Michael Cassese to be entirely false, thus vitiating a vital "probable cause" feature of Detective Eaton's affidavit as aforesaid.

9. Against this background, it is clear that the testimony of Michael Cassese is vital to the defense to disprove Detective Eaton's allegations regarding his unnamed informant.

10. While the Cassese testimony is not all embracing, it nonetheless constitutes an integral part of the defense position, the proof of which is rendered extremely difficult to begin with because we are compelled to prove extrinsically facts which are best known to Detective Eaton which he may easily shield from view owing to the rule often precluding the disclosure of the identity of an informant. The Cassese proofs will amply constitute the threshold evidentiary showing which the Court thrusts upon us. Accordingly, the Court should

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grant the writ ad testificandum.

DENNIS McALEVY

Sworn to before me this

27th day of September, 1973

LAW OFFICES OF

SLOTNICK & NARRAL

15 PARK ROW

NEW YORK, N. Y. 10038

BARRY IVAN SLOTNICK

RAYMOND F. NARRAL

THEODORE SOTERAKIS

ROBERT E. SEGAL

GILBERT ADLER

MALCOLM GROSS

ROBERT THALER

JOSEPH MARCH

ROBERT A. KATZ

(212) BEERMAN 3-1900

December 24, 1973

**Honorable Marvin E. Frankel
United States District Court
United States Court House
Foley Square
New York, New York**

**Re: UNITED STATES OF AMERICA
v. JOHN CAPRA
73 CR 460**

Honorable Sir:

In the light of the Government's letter of December 17, 1973, and its accompanying memoranda, counsel deems it appropriate to further comment regarding the propriety of the "pre-trial arrangements for publicity attending the mass of arrests on the morning of April 13-14, 1973."

We will attempt to partially review some of the publicity that occurred during the totality of proceedings herein in order that the Court may make a proper assessment of its source and its effect upon the proper functioning of the Federal Criminal Justice System.

It is clear that newsmen did attend at least part of the briefing session of some 250 NYPD agents on the evening of April 13 with the knowledge and consent of the United States Attorney.¹

The prosecution asserts their presence was allowed for the purpose of avoiding "leaks" and places the onus of media

1. Exhibit H for identification, of the pre-trial hearings on September 19, 1973 discloses a picture of the briefing session with United States Attorney Walter Phillips in attendance.

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Honorable Marvin E. Frankel

December 24, 1973

participation upon other law enforcement agencies. - Counsel respectfully requests a hearing in order to "test" the above reason and is further concerned about:

(a) Why and in what methods did the alleged "leaks" occur;

(b) Who may have generated and sanctioned the alleged "leaks";

(c) Was the alleged "leaks" a result of governmental action;

(d) Was the presence of the media at these pre and post arrest sessions necessary, proper and correct under the circumstances; and

(e) Was the law enforcement generated publicity at the pre-trial stages, during the trial, and post trial proper under all the circumstances.

The news media received information at the briefing session and furthermore made observations during some of the arrests and raids.

The New York Times of April 17, 1973 carried a lead story on Page 1 written by John Corry who attended the briefing session and "observed" during the arrests and raids. The front page carried a picture, without credit, which depicted a "raiding party, with rifles and equipment for breaking down doors besieging a Bronx apartment." Whether this picture was the product of a news photographer or disseminated by a Government photographer should be the subject of further court inquiry.² Corry's report carried the briefing instructions of Anthony Fohl,

2. For this reason, and for other reasons detailed herein, the defendant has requested a plenary hearing in connection with the publicity generated by this indictment, through the efforts and/or consent of the Government. It is requested that the Government submit all press releases together with memoranda submitted to the media.

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Honorable Marvin E. Frankel

December 24, 1973

Assistant Regional Director of the BND who was reported as announcing "that in the next 60 hours, he expected the agents and detectives to arrest 81 narcotics dealers" one of whom was "thought to have a machine gun." (The New York Times article of April 17, 1973 is attached and marked as Exhibit A). This lead story continued to quote BND agents asking whether an arrestee "sniffs coke, doesn't he?" and another agent answering "and his wife carries a gun, too, right?" Part of the coverage concerned agents entering the "Purple Manor Bar" looking for a suspect. Carry reported that a "man walked out of the toilet. He was stopped and searched. He had a pistol. In the toilet, there were packets of cocaine ... the agents moved about searching. On the floor, under a chair, they found another gun." The agents entered the "Piggy Back Social Club", the scene of another raid and although "the man they had sought was not there", the story reported that "underneath a chair in what passed for a lounge, there was a gun, and underneath a woman's foot was a bottle of cocaine." No suspects were arrested at either the "Purple Manor" or the "Piggy Back Social Club".

The Daily News of April 17, 1973, Pages 1 and 3, (Exhibits E and F, Hearings of September 19, 1973), depicted John Capra being led from his home after arrest and the story by Edward Kirkman began

"[a]n electric bug planted over a year ago in an East Harlem bar led yesterday to the indictment of 86 persons as major drug dealers charged with supplying a large portion of the heroin and cocaine in the Metropolitan area and as far west as Detroit" ...

"Among the top figures arrested on conspiracy charges were Herbert Sperling ... and John (Johnny Hooks) Capra, 33, of 15 Northwood Circle, New Rochelle. Both men, like many of the others collared, reportedly have overseas drug connections and handle as much as a kilo of cocaine or heroin a week."
[Emphasis added].

The entry by Reporter Kirkman into the Capra home with the arresting agents resulted in another story carried on page 3 of

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Honorable Marvin E. Frankel

December 24, 1973

the News which, in vivid reportorial terms, described the furnishings inside the house and carried alleged quotes of what Capra's wife said to the agents.

The New York Post of April 16, 1973 reported the arrest as a result of the news conference held by United States Attorney on the morning of that day.³

The photographing of arrestees being led to and from BNDD Headquarters on the morning of April 16, 1973 was a major part of the publicity in this case. The photographs were taken after the Government advised the media that "the defendants arrested in these raids would be transferred from BNDD Headquarters to the Southern District of New York for arraignment at approximately 9 A.M. on Monday, April 16, 1973" (Memorandum May 21, 1973, page 4).

Although the Court has requested information limited to publicity attending the April 13-14 arrests, other instances of pre-trial publicity occurred which, in the opinion of defense counsel, are of assistance in determining whether the Court should exercise its supervisory power to insure proper standards for Federal criminal justice.

1. A few days after the arrests, there was television coverage by Geraldo Rivera of ABC's Eye Witness News of the actual execution of a search warrant for Diane's Bar. Part of the search conducted by BNDD agents was televised and the BNDD agents' comments were carried. It was reported that a white powder was found and that "traps" existed which could be used to store heroin.

2. Immediately, prior to trial, the Daily News printed a five day serial concerning Ceil Mileto, a witness at the trial

3. No representatives of the New York Post attended the briefing or "observed" the arrests or raids. Statements of that press conference are annexed hereto as Exhibit B and are astounding as well as highly prejudicial and beyond the bounds of fair comment with regard to this case.

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Honorable Marvin E. Frankel

December 24, 1973

of Herbert Sperling. At the time of the interview, Ceil Mileto was in protective custody and could not have been interviewed without approval of the Government.

3. Some time after the arrest of Capra, the arresting officer, Gillespie, was interviewed on a television show carried by Manhattan Cable TV concerning arrests and the investigation.

Defense counsel has already brought to the Court's attention the New York Magazine article which appeared during the trial. That article, although not directly concerned with the indictment before the Court, did link its story to April arrests and did contain posed pictures and photographs from Government files, one of which counsel indicated to the Court was not a public record.

Finally, at the conclusion of the trial, the media reported the release of the defendants Capra, Guarino, Della Cava and Germain after their conviction, for Thanksgiving Day. The Government reported to the Daily News that "30 agents had been assigned to the watch ... that agents had been ordered to telephone the narcotics offenders every two hours until they surrendered ..." (Daily News, November 22, 1973, page 42).

The Government further reported to the News that "in one week last April, the conspirators received, tested, mixed and distributed 8 kilos of pure heroin. This had a wholesale value of \$320,000.00 with an estimated street value, when cut and diluted, of over six million dollars".

In light of the publicity attending the arrest, trial and conviction of the defendants, counsel respectfully urges the Court to conduct a plenary hearing relating to the source and effect of the publicity and to adjourn the sentence of the defendants for a reasonable period of time.

The supervisory power of this Court over the proper administration of the Federal Criminal Justice System is without question, Marshall v. United States, 360 U.S. 310 (1959). The Supreme Court in Janko v. United States, 366 U.S. 716 rev'g. 281

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Honorable Marvin E. Frankel

December 24, 1973

F.2d 156 (8th Cir. 1960) has seemingly recognized the subliminal impact on Federal juries of even a single newspaper item. A procedure employed by the Government: need not be identifiably prejudicial to be abhorrent to due process for at times it involves such a probability that prejudice will result that it is deemed inherently lacking in due process, Estes v. Texas, 381 U.S. 532 (1965).

The expressed disapproval of Mr. Phillips and the attendance of the media at the briefing session and the expressed disapproval of Mr. Seymour to Mr. Casey "of the manner in which the arrests were handled insofar as the press was concerned" and the expressed disapproval of Mr. Curran to the Court concerning the accompanying of agents by reporters on arrest missions are factors to be given serious consideration in assessing what remedy the Court should invoke to deter further violations as have occurred.⁴ A further factor to be considered is, in the opinion of counsel, whether the standards of due process have been contravened in an isolated instance or whether the acts constituting the breach of established standards are a regularly practiced tool of the law enforcement authorities subject to the Court's jurisdiction.⁵ If the accepted standards are and have been continually breached, the fair inference to be drawn is that the Government has infested the community atmosphere and developed a deep prejudice throughout the community against a defendant charged with a specific crime.

"I do not believe it within the province of law enforcement officers actively to cooperate in activities which tend to make it more difficult for the achievement of impartial justice."

Ridgem v. Louisiana, 373 U.S. 723 (1963, dissenting opinion Mr. Justice Clark).

4. We construe all the above "expressed disapprovals" as consciousness of wrongs to the defendants.

5. Counsel alleges press conferences, "leaks", press releases and other forms of news management by the Office of the United States Attorney in other celebrated cases and a similar procedure of photographing arrestees in transit in United States v. Tranter - a most recent narcotics "mass round up" type of case.

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Honorable Marvin E. Frankel

December 24, 1973

The Government has, in substance, tendered the argument that the criminal should not go free because the Constable has blundered but, as was said in Elkins v. United States, 364 U.S. 206 (1960) "there is another consideration ... the imperative of judicial integrity."

"The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a Government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."

Mapp v. Ohio, 367 U.S. 643 (1961).

It is, unfortunately, a time when the Government's administration of justice toward particular categories of defendants is seriously being questioned. The resort to a radical remedy such as dismissal of the indictment herein to secure the proper standards of Federal law enforcement cannot be said to fetter the law enforcement authorities.⁶ No justifiable purpose was served, it seems, by the actions detailed above, nor would it have compromised the principles of a free press or impeded the right of the Government to investigate and/or present its case to have prevented their occurrence.

Counsel believes that the issue of a free press is not in question in this case, for the resulting publicity which has led us to this point could have been avoided through the proper observation by law enforcement officials of their obligations under Rule 8 of the District Court Rules. Furthermore, a hearing to determine whether the publicity in this case was a necessary and isolated incident or regularly practiced is necessary. Pending

6. Reversal has been sanctioned after conviction of the most heinous crimes; mass murder, Irvn v. Dowd, 366 U.S. 181 (1952); murder, Sheppard v. Maxwell, 384 U.S. 333 (1966); and a Superior Court Judge of Connecticut has recently refused to commence a re-trial of People v. Bobby Seal and Erica Huggins and dismissed the murder-kidnaping indictment against them due to the fact of improper publicity, see New York Times, April 26, 1971, Page 1, Col. 3.

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Honorable Marvin E. Frankel

December 24, 1973

that hearing and determination, the defendant requests that the Court hold all other matters in abeyance. In view of all that has occurred herein, the defendant respectfully moves that the indictment be dismissed with prejudice as against him. However, he recognizes that this most drastic request should be accompanied by an application for hearing so that the Court may obtain a full view of the entire situation and "test" the theories advanced together with the reasoning thereof.

Alternatively, the defendant requests that if the Court deny the above requested hearing for dismissal, that it adjourn his date of sentencing which is scheduled for January 3, 1974. Counsel has been informed that the most recent piece of publicity appears in this month's Readers Digest in an article by Detective George Eaton concerning this matter and more specifically, the defendant Capra. (The article was published after the Court's memorandum regarding publicity). In view of the above, together with the "Thanksgiving Articles", defendant Capra requests a continuance of his sentence date until such time as the appearance of prejudice disappears - if ever.

Respectfully submitted,

BARRY IVAN SLOTNICK
Attorney for Defendant JOHN CAPRA

BIS:ab

CC:

Honorable Paul Curran
United States Attorney
Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

73 CR 460

-against-

LEOLUCA GUARINO, et als.,

Defendants.

DEFENDANT GUARINO'S
MEMORANDUM OF LAW

DENNIS D. S. McALEVY
Attorney for Defendant
Guarino

I .DUPPLICITY

The joinder of conspiracies in Count I of the indictment is duplicitous for the reason that the two separate conspiracies charged are punishable upon conviction by two differing limits of imprisonment. United States v. Gibson, 310 F. 2d 79 (2d Cir. 1962), held a joinder of two offenses (failure to register and pay a special tax to import marijuana and selling illegally imported narcotics) to be duplicitous and therefore, violative of Rule 8(a) of the Federal Rules of Criminal Procedure. Similarly, Brown v. United States, 299 F. 2d 438 (1962) held a joinder of charges violating conspiracy statutes duplicitous if it is impossible to determine, for the purpose of punishment, upon which charge the jury convicted. See also United States v. Shackelford, 180 F. Supp. 857 (1957).

Rule 14 of the Federal Rules of Criminal Procedure contains the remedy for duplicitous joinder. The Government, therefore, should elect upon which charge contained in Count I it will rely or the court should limit the proof to only one of the charges in the duplicitous count. United States v. Gibson, Supra.

II.

THE ARREST OF THE DEFENDANT GUARINO ON FEBRUARY 3, 1972 WAS ILLEGAL AND THE EVIDENCE GAINED THEREFROM SHOULD BE SUPPRESSED.

According to the affidavits of Detective Eaton concerning GUARINO'S arrest, probable cause to arrest GUARINO rested upon the interception of a conversation between GUARINO and DELLA CAVA and the observation of Detective Eaton of GUARINO speaking to DELLA CAVA through a car window on a public street.

It is counsel's contention that the mere presence of GUARINO with a suspect cannot establish a sufficient basis for probable cause. United States v. Di Re, 332 U.S. 581 (1948). In that case, the officer followed a suspect and the defendant was seated in the front seat of a car next to the suspect. He was arrested with the suspect and without a warrant. The question became whether there was probable cause to arrest the defendant on a charge of conspiracy to which the court responded in the negative:

"The argument that one who 'accompanies a criminal to a crime rendezvous' cannot be assumed to be a bystander, forceful enough in some circumstances, is far fetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain sight of passersby, in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal. United States v. Di Re, Supra at 593. "

The conversation alleged by Detective Eaton to form a further basis for probable cause apart from being innocent and innocuous, was illegally intercepted. (See discussion below relating to illegal interception of conversations over telephone in Diane's Bar), and accordingly, cannot form a basis for probable cause.

The arrest disclosed the identity of GUARINO and implanted in Detective Eaton's mind a criminal relationship between DELLA CAVA and GUARINO which relationship was used in succeeding affidavits by Detective Eaton to establish probable cause for the issuance of eavesdropping orders. The fact that the arrested individual was GUARINO is inadmissible for any purpose if that identity was learned as a result of the illegal arrest. United States v. Edmonds, 432 F. 2d 577 (2d Cir. 1970).

III.

THE USE OF CONVERSATIONS BETWEEN PARTIES NOT NAMED IN THE EAVESDROPPING ORDER IS ILLEGAL AND TO THE EXTENT THAT THOSE CONVERSATIONS FORM A BASIS FOR PROBABLE CAUSE TO ISSUE EAVESDROPPING ORDERS, THOSE EAVESDROPPING ORDERS ARE ILLEGALLY ISSUED. §

The extension of the first Diane's Bar eavesdropping order was based in the main upon the interception of conversations between parties not named in the eavesdropping order. United States v. Vega, 51 F.R.D. 503 (E.D.N.Y. 1971). Monitoring all telephonic communications including

parties who are not named in the order is constitutionally proscribed by Berger v. New York, 388 U.S. 41 (1967). Accordingly, to the extent that the affidavits submitted in support of various eavesdropping orders are based upon the illegal interception of conversations between parties not named in the prior eavesdropping warrant, probable cause for the issuance of the succeeding eavesdropping warrant was not established.

Similarly, the leads provided by the interception of conversations between parties not named in eavesdropping orders should clearly be suppressed. Wong Sun v. United States, 371 U.S. 471 (1963).

I V .

THE AFFIDAVITS OF DETECTIVE EATON IN SUPPORT OF THE ELECTRONIC SURVEILLANCE IN THIS CASE ARE REplete WITH UN-SUBSTANTIATED OPINION WHICH CANNOT BE THE PREDICATE FOR PROBABLE CAUSE.

Detective Eaton's opinions interpreting objectively innocuous conduct and conversations of GUARINO and others effectively removed the determination of probable cause from the hands of the neutral magistrate. The neutral magistrate must be able to look at facts, not opinions, if he is to make a legal judgment of his own. Katz v. United States, 389 U.S. 347 (1967); Terry v. Ohio, 392 U.S. 1 (1968). In Terry, the Supreme Court addressed this question with respect to "stop and frisk" and reaffirmed that the ultimate test is not the opinion of the police officer but the reasonable man standard:

"The police officer must be able to point to specific and articulable facts which taken together with rational inferences from those facts, reasonably warrant the intrusion. 392 U.S. at 21

(would the facts available) "warrant a man of reasonable caution in the belief"(that the action taken was appropriate). 392 U.S. at 22. "

Once this view of the law is accepted, it becomes a fact question to be developed at the hearing and through presentation to the Court, that the objective facts do not add up by themselves, and that the interpretative opinions are not based on any expertise, just on assumptions about the guilt of the individuals involved. The use of the "major narcotics violators" list throughout the affidavits is an example of the use of impermissible factors by the agents in the making of their own assumptions; a man's prior record is not probative of his possible commission of crimes. Spinelli v. United States, 393 U.S. 410 (1968). There are instances of self-contradiction. "Fatso" is referred to as two different people, Inglese in March 8 affidavit, Angelo Golio in June 26 affidavit; the Club is closed and nobody's there, but it is being used as a narcotics meeting place (April 7 affidavit); since brown packages are innocent-looking, they must contain heroin (June 26 affidavit); when nothing is said, or people are unwilling to talk, or the "topic of discussion is not mentioned," "these conversations quite possibly relate to narcotics" (August 15 affidavit);

Capra's carrying real shirts into a bar means the shirts contain heroin (February 13, 1973 affidavit). And, there are, of course, the many purely innocuous conversations which can be stretched to cover the conversations put forth by the Government as incriminating, for example, in their contexts, these latter conversations may be shown to relate to prior or subsequent discussions about air conditioning or T.V. sets or Dellacava's girlfriend. Moreover, Detective Eaton states in his affidavit of September 8, 1972 that after observing and listening from December 8, 1971 to September 8, 1972 "it is difficult to ascertain precisely what these events lead up to".

To the extent, therefore, that the probable cause forming the basis for the issuance of eavesdropping orders are based upon Detective Eaton's opinion, unsupported by objective facts, the eavesdropping orders issued as a result thereof are illegal.

V.

THE HAVERMEYER BUG.

The objective facts relied upon by Detective Eaton to establish probable cause to bug conversations of GUARINO at Havermeyer are the February 3, 1972 arrest which has previously been shown to be illegal and which on September 8, 1972 is stale information (see Sgio v. United States, 287 U.S. 206 (1932)). Detective Eaton's further references to GUARINO have him entering and leaving the premises (see paragraph 5e and 5f) and further relates events alleged to have occurred on August 2, 1972 wherein GUARINO arrives at the premises with a passenger in his car and

subsequently exits with others who "took up positions up and down the streets". MICHAEL CAPRA thereafter exits the premises carrying an attache case which appeared to be bulging and a white plastic bag which appeared to be "partially full with something". After MICHAEL CAPRA and another person drove away, GUARINO re-entered the premises.

If the facts which were alleged to have occurred on August 2, 1972 were incriminating to the extent that Detective Eaton opines, his statement in paragraph 12 of his September 8, 1972 affidavit that "it has been impossible...through normal investigative techniques and procedures to have them prosecuted" is clearly without foundation and fact and the application should have been denied by the issuing justice. Moreover, after detailing further facts which allegedly occurred on August 28, 1972 and August 30, 1972, Detective Eaton is of the opinion that "several pounds of narcotics would have been seized and STEVEN DELLA CAVA, JOHN CAPRA, MICHAEL CAPRA, LEOLUCA GUARINO, GENNARO ZANFARDINO, and the man driving MADSON'S car would now be in custody charged with criminally possessing and/or selling dangerous drugs in the 1st degree." The Seventh Circuit has recently said:

"...the conclusory statement in the application and affidavit that 'normal investigative methods reasonable appear to be unlikely to succeed and

are too dangerous to be used' is too slender a reed upon which to rest the invasion of ... privacy." United States vs. Kahn, 471 F. 2d 191, 197 (7th Cir., 1972).

A regular search warrant for Havermeyer was available if there was probable cause for a tap, and if so, it should have been used.

"Normal investigative procedures would include for example, standard visual or aural surveillance techniques by law enforcement officers, general questioning or interrogation under an immunity grant, use of regular search warrants, and the infiltration of conspiratorial groups by undercover agents or informants." Senate Report No. 1097, 90th Cong., 2d Sess., 1968, U.S. Code, Cong. and Adm. News at p. 2190.

Indeed, a search warrant was used on December 6 and some heroin tracings were found. There is no reason why this could not have been done before the taps were installed. According to the rationale of Berger, it should have been done.

The Havermeyer Bug was an unauthorized eavesdrop.

The order stated, "in no event will the effective date of this order be any later than seven (7) days after the issuance of this order, i.e., September 11, 1972... Thus, the maximum effective date of the order was September 18, but the bug was not installed until September 19. The October 18 extension order, while stating that the bug was not installed until September 19, simply puts the effective date at September 18, even though the bug was not then yet installed. Thus, the authorizing court's interpretation of its own order is that the

"effective date" did not relate to the authorization itself, but only to the beginning of the running of the 30 day period. Once the maximum effective date had passed, the agents were required to return to the court to renew their application; the purpose of setting the maximum effective date is otherwise negated. That purpose is to comport with the statutory requirement that the order be executed "as soon as practicable" (C.P.L. Section 700.30 7); 18 U.S.C. Section 2518 (5)), in order to preserve the freshness of the probable cause and other allegations in this affidavit. See Senate Report, U.S. Code, Cong. and Adm. News, 1968, pp. 2112 et seq.

The application for the Havermeyer bug was apparently based also upon the assertions related therein of an unreliable informer who gave his information on August 21, 23, and 25, 1972. Without the tip from this informant, probable cause against GUARINO, since it is based upon prior illegalities and innocuous conduct, could not be established. What the tip did in the affidavit, however, was precisely what the Supreme Court rejected in Spinelli v. United States, 393 U.S. 410 (1969); the totality of circumstances had a certain self-reinforcing quality:

"(T)he informant's tip gives a suspicious color to the F.B.I.'s reports detailing Spinelli's innocent seeming conduct and that, conversely, the F.B.I.'s surveillance corroborates the informant's tip thereby entitling it to more weight". Spinelli v. United States, Supra at 415.

By rejecting this mode of analysis, the Supreme Court has made clear that unless the tip satisfies the standards of Aquilar v. Texas, 378 U.S. 108 (1964) innocent appearing conduct must be presumed innocuous and cannot be an element in the determination of probable cause. Thus the fact that GUARINO entered and left the premises or that he carried a suitcase or peered in a van or "took up a position" (the basis of Detective Eaton's conclusion that GUARINO "took up a position" must be determined at a hearing) should not be considered as basis for probable cause. We are left, therefore, with the tale of an unreliable informer uncorroborated except insofar as GUARINO'S use of the premises is concerned. The Magistrate could not make the required inferences he is required to make, because of the "self-reinforcing quality" of the Havermyer affidavit. Spinelli v. United States, Supra; Aquilar v. Texas, Supra. A rigorous examination of the affidavit is necessary to determine whether there was probable cause to intercept GUARINO'S conversation and that rigorous examination cannot be examined in an ex parte manner. United States v. Halsey, 257 F. Supp. 1002 (D.C.N.Y. 1966); United States v. Roth, 285 F. Supp. 364 (D.C.N.Y. 1968).

" 'Although the reviewing court will pay substantial deference to judicial determinations of probable cause, the court must still insist that the magistrate perform

his 'neutral and detached' function and not serve merely as a rubber stamp for the police.' "
Aquilar v. Texas, Supra at 111.

In view of the fact that the "neutral magistrate" involved in the issuance of eavesdropping orders apparently made no objection to the use of blatantly illegal interceptions of conversations to establish probable cause, counsel suggests that the deference required by Aquilar should not be given in this case. Counsel's suggestion is further reinforced by the clear instances of perjury, mis-statements of fact and opinions which infect the affidavits from beginning to end.

V I .

FAI LURE OF THE STATE AUTHORITIES OR THE GOVERNMENT TO GIVE NOTICE OF THE ELECTRONIC SURVEILLANCE CONDUCTED IN THIS CASE IS GROUNDS FOR SUPPRESSING THE EVIDENCE OBTAINED AS A RESULT THEREOF.

Neither the State nor federal authorities complied with the provisions of 18 U.S.C. 2518 (8) (d) and N.Y.C.P.L. Section 700.50. [Failure to do so] has been held grounds for suppression of all wire tap evidence. United States v. Eastman, 465 F. 2d 1057 (1972). The further failure by State and federal authorities to seek judicial postponement of service of the inventory and notice required by 18 U.S.C. Section 2518 (8) (d) and N.Y.C.P.L. Section 700.50 (4) made the electronic eavesdropping conducted herein a "secret search" and, therefore, violative of the standards set down in Katz, Supra.

and Berger, Supra. In Berger, great emphasis was laid upon the fact that the New York statute, declared unconstitutional by that court, contained no notice requirements. The court further stated that exigent circumstances should, however, be grounds for judicial postponement of notice. Never did the court hint that notice should be dispensed with without adequate judicial supervision or protective procedures. Given the length of time that the electronic eavesdropping continued in this investigation and given the failure of the monitoring officers to meaningfully minimize the interception of communications, the failure to apply to a court for a judicial postponement of notice must infect the entire surveillance and the evidence obtained therefrom must be suppressed.

Unintentional violation of the notice requirements might not require suppression. See United States v. Wolk, 466 F. 2d 1143 (1972). However, the burden to establish an unintentional violation of the statute should be on the Government, and counsel is prepared at a hearing to demonstrate the intentional nature of the failure to give notice in this case.

V I I .

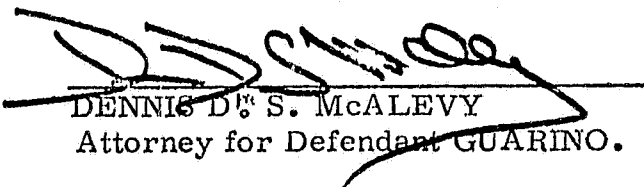
THE EVIDENCE SEIZED AT THE TOLEDO RAILROAD STATION IN OCTOBER OF 1971 SHOULD BE SUPPRESSED.

The defendant GUARINO has alleged in his affidavit a possessory interest in a bag which was searched without a warrant. The search was conducted by the police.

Since the delivery of a package to a common carrier does not forfeit ones right of privacy thereto (see ex parte Jackson, 96

U.S. 727 733; Corngold v. United States, 367 F. 2d 1; Santana v. United States, 329 F. 2d 854., the fact that the bag owned by the defendant GUARINO was in the custody of the Penn Central Railroad at the Toledo Railroad Station, does not deprive the defendant of standing to assert an invasion of his privacy in the bag opened by the Toledo police. The bag was searched in Toledo and after the search contraband was found. No search warrant was applied for or obtained. Neither was there a warrant of seizure after the contraband was discovered, applied for and obtained. Accordingly, the search by the police in Toledo was illegal. Coolidge v. New Hampshire, 403 U.S. 443; Chapman v. United States, 365 U.S. 610.

Respectfully submitted,


DENNIS D. S. McALEVY
Attorney for Defendant GUARINO.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

NOTICE OF MOTION

LEOLUCA GUARINO, et als.,

73 CR 460

Defendants.

PLEASE TAKE NOTICE that upon the annexed affidavit of DENNIS D. S. McALEVY, ESQ., sworn to the 6th day of September, 1973 and the affidavits of STEVEN DELLA CAVA, LEOLUCA GUARINO and JOHN CAPRA sworn to the 5th day of September, 1973 and upon the indictment and all the prior proceedings had herein, the undersigned will move this court, at the United States Court House, Foley Square, New York, New York for an Order:

1. Pursuant to Section 14 of the Federal Rules of Criminal Procedure declaring the 1st Count of the indictment duplicitous;

2. Striking the alias "Spike" used in the indictment as to LEOLUCA GUARINO;

3. Pursuant to 18 U.S.C. Section 2500, et seq., and Rule 41E of the Federal Rules of Criminal Procedure for suppression of evidence gained as a result of unlawful eavesdropping;

4. Pursuant to Rule 41E of the Federal Rules of Criminal Procedure suppressing information gained as a result of the illegal arrest of LEOLUCA GUARINO;

5. Pursuant to Rule 41E of the Federal Rules of Criminal Procedure for a hearing in regard to the suppression of the above mentioned

evidence and all evidence resulting therefrom; and

6. For such other and further relief as to the Court is just and proper.

Yours, etc.

DATED: Jersey City, N.J.
September 6, 1973.

DENNIS D. S. McALEVY, ESQ.
Attorney for Deft. GUARINO
Office & P.O. Address
921 Bergen Avenue
Jersey City, N.J. 07306

-against-

Defendant.

STATE OF NEW JERSEY)
)ss.:
COUNTY OF HUDSON)

He is the attorney for the defendant, LEOLUCA GUARINO, and submits this affidavit in support of the within motions.

A.

COUNT I OF THE INDICTMENT IS DUPLICITOUS AND, ACCORDINGLY, THE GOVERNMENT SHOULD ELECT UPON WHICH CHARGE IT WILL RELY OR THE COURT SHOULD LIMIT THE PROOF TO ONLY ONE OF THE CHARGES IN THE DUPLICITOUS COUNT'

1. Count 1 of the indictment charges a continuing conspiracy extending from July, 1969 through and including the date of the indictment to violate Section 4705 A of Title 26 U. S. C. and Section 812 of Title 21.
2. Conspiracy to violate 28 U. S. C. Section 4705 A is punishable by not less than five or more than 20 years imprisonment whereas conspiracy to violate 18 U. S. C. Section 812 is punishable by a term of imprisonment up to 15 years. Second offenses under the respective statutes are punishable by not less than 10 or more than 40 years imprisonment and by a term of imprisonment up to 30 years.
3. Since, therefore, the first count of the indictment contains two charges, each of which carries a different penalty, the Court should, pursuant to Rule 14 of the Federal Rules of Criminal Procedure, require the Government to elect upon which charge in the count it will rely or limit the proof to

only one of the charges in the duplicitous count.

B.

THE DEFENDANT'S ALIAS SHOULD BE STRICKEN

4. Defendant GUARINO is named in the indictment as LEOLUCA GUARINO a/k/a "Spike".

5. The alias alleged by the indictment does not form an integral part of any of the crimes charged therein. Neither is there any question presented as to identity of GUARINO.

6. In the event that there is a Government witness who only knew the defendant as "Spike" the identification of GUARINO should be settled prior to trial. Otherwise the alias should be stricken.

C.

INTRODUCTION TO SUPPRESSION OF EVIDENCE
GAINED AS A RESULT OF UNLAWFUL EAVESDROPPING

7. The eavesdropping relating to this case spans a period from December 8, 1971 to February 14, 1973. Each eavesdropping order was based upon what was obtained in the prior orders. The affidavits submitted in support of each order are made by one person, Detective George Eaton.

8. Counsel has chosen to highlight relevant portions of the affidavits to demonstrate (1) perjury of Detective George Eaton relating to the affidavit submitted in support of the first order; (2) total non-minimization; (3) illegality begetting illegality; (4) opinions of Detective Eaton based upon a bad faith selection of portions of intercepted communications (some apparently authorized and others clearly and directly unauthorized) which selections were accepted by the reviewing magistrate who signed each order without having supervised the interception of communications; and (5) that had the interception of communications been supervised in a meaningful way, Detective Eaton's perjury would have been discovered, the illegality would not have be-

gotten further illegalities and the opinions related in the affidavits would have been exposed to be totally without foundation in fact.

9. Accordingly, in addition to the grounds detailed in the following paragraphs below relating to each order individually, counsel adds that the totality of the eavesdropping surveillance conducted during this investigation demonstrates such a callous disregard for the protection of Fourth Amendment, Sixth Amendment and First Amendment rights, that the prosecution should be barred and the indictment dismissed. No judicial excising or suppression herein is possible of repairing the harm directed against the defendants. Perjury has allowed the constable to intrude into the privacy of the defendants and slowly weave his ever increasing web of information and to surmise, suspect and surreptitiously surveill the defendants in conversation with their wives, children, girlfriends, business associates, attorneys and friends. All this, done without a hint of judicial supervision during the continuance of the interceptions and in flagrant violation of the inventory and notice provisions of 18 U. S. C. 2518 (d) and New York Consolidated Laws, Chapter 11-A, Criminal Procedure Law Section 700.50 (4). Neither does there appear evidence in the discovery provided by the Government that any of the defendants were ever given the required notice of eavesdropping, nor does it appear that those notice requirements were judicially postponed.

D.

EAVESDROPPING WARRANT DATED DECEMBER 8, 1971
AUTHORIZING INTERCEPTION OVER TELEPHONES BEARING THE NUMBERS 722-9595 AND 824-6406 SUBSCRIBED TO RESPECTIVELY BY A BAR & GRILL AT 2034 SECOND AVENUE, NEW YORK, NEW YORK AND M. DELLA VALLE, 1475 THERIOT AVENUE, BRONX, NEW YORK

10. The order above is defective since it contains an improper minimization clause. That clause in paragraph 4 of the order states "this order shall be conducted in such a way as to minimize the interception of communications not related to the aforementioned crimes." Since the above

clause only proscribes interceptions of a category of communications without excluding conversations of parties not specifically named and identified, it contravenes the requirements of CPL 700.30 (7) and 18 U. S. C. 2518 (5).

11. The affidavit submitted in support of the above order is materially perjurious for the following reasons:

(a) In paragraph 14 and 15, Detective George Eaton swears that he overheard a conversation between his confidential informer and Joseph Della Valle on October 29, 1971 and November 2, 1971. Those conversations were used by him to establish probable cause to believe that Joseph Della Valle was using the above phones for narcotics negotiations.

(b) I am informed that Joseph Della Valle denies that such conversations took place between him and the affiant's informer on the above phones or on any phones.

(c) There is evidence of this perjury in the transcript of United States v. Sperling, 73 CR 441 and in prior affidavits submitted by Detective Eaton, which information counsel believes should be developed at a hearing.

12. The order was executed without minimizing conversations not subject to interception. It is evident from the logs that the machine used to intercept conversations pursuant to this order was never turned off. Conversations characterized by the monitoring officers as not pertinent were listened to, recorded and many transcribed; and, if the monitoring officers turned the sound off on the machine, the machine continued to record and did record each and every conversation. By way of illustration, counsel has counted 80 conversations intercepted and recorded pursuant to this order between STEVEN DELLACAVA, a party not named in the order, and others similarly unnamed in the order. 63 of these conversations were marked not per-

tinient by the monitoring officer and recorded in full and overheard. 34 conversations of the 80 were between STEVEN DELLACAVA and either his wife, his son or his girlfriend. Two conversations of the 80 were with his attorney and were similarly overheard and recorded. 73% of STEVEN DELLACAVA'S conversations were designated not pertinent by the monitoring officers and, none-the-less, overheard and recorded.

13. The defendant, LEOLUCA GUARINO, was overheard in conversation with STEVEN DELLACAVA, neither of them named in the order, on December 22, 1971 at 12:10 P.M. and December 16, 1971 at 8:12 P.M.

E.

EXTENSION AND AMENDMENT OF EAVESDROPPING WARRANT DATED JANUARY 6, 1972
WHICH ADDED STEVEN DELLACAVA AS A PARTY
TO THE ORDER

14. The order of extension is defective for failure to contain a proper minimization clause for the reasons stated above in paragraph 10.

15. The affidavit submitted in support of the extension relies upon conversations between STEVEN DELLACAVA and others intercepted pursuant to the prior order when STEVEN DELLACAVA and the persons to whom he was speaking were not named parties to that eavesdropping order. Accordingly, the entire basis supporting the extension consists of illegally overheard conversations and the order, therefore, is defective.

16. The extension order was not executed in a way as to minimize the interception of conversations not otherwise subject to the order. Counsel has counted 143 conversations of STEVEN DELLACAVA, all recorded and all listened to. Of these 143 conversations, 109 are marked by the monitoring officers as not pertinent and 32 are between DELLACAVA, his wife, his girlfriend and his son.

17. Pursuant to this order, a conversation between STEVEN DELLACAVA and the defendant, LEOLUCA GUARINO, was intercepted, which

conversation led to the arrest of STEVEN DELLACAVA and LEOLUCA GUARINO on that same date. (The illegality of that arrest is dealt with at paragraphs 37 through 40 of this affidavit.)

I.

EAVESDROPPING WARRANT DATED JUNE 9, 1972
AUTHORIZING INTERCEPTION OVER TELEPHONE
BEARING NUMBER 831-9247 SUBSCRIBED TO BY
STEVE'S AIR CONDITIONING, 2036 SECOND AVENUE,
NEW YORK, NEW YORK.

18. The above named order is defective for failure to contain a proper minimization clause for the reasons stated in paragraph 10.

19. A conversation of LEOLUCA GUARINO with a female was intercepted pursuant to this order on June 19, 1972 at 5:15 P.M. That interception was an illegal interception in that neither GUARINO nor the female was a party named in the above order.

20. On July 1, 1972 at approximately 6:20 P.M., a person designated as "JIMMY RINALDI" dialed out on the abovementioned phone and got no answer. While the phone was ringing, a conversation between STEVEN DELLACAVA, LEOLUCA GUARINO and RINALDI was overheard by the officers which conversation took place inside the premises 2036 Second Avenue. (See paragraph 10 of the affidavit of Detective George Eaton dated July 12, 1972, submitted in support of an extension of the above order). The interception of that conversation was illegal since the eavesdropping order provided only for the interception and recording of "telephonic conversations of STEVEN DELLACAVA and 'JIMMY' over the above described telephone". The aforementioned interception of a conversation inside the premises was, therefore, a "bug" as opposed to a telephonic eavesdropping and was specifically unauthorized.

21. The order was executed without minimizing conversations not subject to interception. It is evident from the interception of the conversation

inside the premises referred to in paragraph 20 above, that the monitoring officers intercepted everything whether pertinent, non-pertinent, authorized or unauthorized. Moreover, the logs reveal that on rare occasions, the monitoring officers turned the machine off. Nevertheless, the machine continued to record.

22. The affidavit of Detective Eaton in support of the above order also reveals that all of the facts gleaned from eavesdropping warrant 87-1971 (interception of telephonic communications from the phone at the Bar & Grill at 2034 Second Avenue) were used to establish probable cause for the issuance of the order. The fact of defendant, LEOLUCA GUARINO'S arrest with DELLACAVA on February 3, 1972, was also submitted in support of the order. (The grounds establishing the illegality of that arrest are discussed in paragraphs 37 through 40 of this affidavit). Moreover, the fact of GUARINO'S identity was only established as a result of the illegal interception of a conversation had on December 16, 1971 at 8:12 P.M. between GUARINO and DELLACAVA, pursuant to the eavesdropping order dated December 8, 1971 (see paragraph 14 supra) and the February 3, 1972 arrest. Nowhere in any affidavit submitted by Detective Eaton from December, 1971 through February, 1973 is any independent basis for establishing GUARINO'S identity set forth.

23. Each and every conversation related in the affidavit submitted in support of the above order was overheard as a result of the illegal interception of telephone conversations on the Bar & Grill phone during December, 1971 and January and early February of 1972.

G.

ORDER EXTENDING EAVESDROPPING WARRANT
AUTHORIZING INTERCEPTION OVER TELEPHONE
BEARING NUMBER 831-9247 SUBSCRIBED TO BY
STEVE'S AIR CONDITIONING, 2036 SECOND AVENUE,
NEW YORK, AND ADDING LEOLUCA GUARINO AS A
NAMED PARTY

24. The order of extension is defective for failure to contain a proper minimization clause for the reasons stated in paragraph 10.

25. The affidavit submitted in support of the extension is defective in that the total of its content is a result of illegal eavesdropping and illegal arrest. Paragraph 7a of the affidavit dated July 12, 1972 is based on Detective Eaton's knowledge gained from the arrest of GUARINO on February 3, 1972 that that individual was, in fact, LEOLUCA GUARINO. Paragraph 7 which relates Detective Eaton's opinion that DELLACAVA and GUARINO are continuing to engage in narcotics traffic is based on the prior illegal arrest of GUARINO and DELLACAVA and upon overhearing illegally intercepted conversations at the Bar & Grill during December of 1971. Paragraph 7b is based upon the illegal interception of a conversation between GUARINO and a female which occurred on June 19, 1972 over Steve's Air Conditioning phone when neither GUARINO nor the female were a party to the order. Paragraph 7g containing Detective Eaton's opinion with respect to GUARINO'S relationship with DELLACAVA is based solely on the illegal arrest of February 3, 1972 and the illegally overheard conversation of June 19, 1972. Paragraph 7i which relates the action observed on June 23, 1972 to the action observed on December 23, 1971 is a direct result of the officers illegal interception of conversations on December 23, 1971 pursuant to the defective order of December 8, 1971. Paragraph 9 of the affidavit again relates present action to action of February 3, 1972 which action in February was discovered through illegally overheard conversations and an illegal arrest. Paragraph 10 of the affidavit relates to conversation had inside the premises and overheard contrary to the provisions of the order of extension. Moreover, Detective Eaton's strained opinion of what the conversation in paragraph 10 relates to is evidence of his total failure to apprise the Court of the full facts developed by the electronic surveillance; for if he had related to the Court that RINALDI had been overheard telling his girlfriend that the neighborhood was getting too violent and the business would have to be moved to a quieter place, the neutral magistrate reviewing the ap-

plication might not have had to rely exclusively on Detective Eaton's opinion concerning the import of the conversation.

26. Paragraph 11 of the affidavit again discloses that Detective Eaton's reliance on the relationship between DELLACAVA and GUARINO is established by his investigation culminating in the February 3, arrest. Paragraph 14 fully discloses that Detective Eaton's bases his application for extension on paragraphs 34 and 35 of his affidavit of December 8, 1971 which affidavit has been shown to be perjurious in a material respect.

27. The extension order was not executed in a way as to minimize the interception of conversations not otherwise subject to the order. According to the logs, the monitoring officers recorded and/or listened to all of the conversations intercepted pursuant to the above order.

H.

RENEWAL AND AMENDMENT OF EAVESDROPPING
WARRANT DATED AUGUST 15, 1972 WHICH RENEWAL
AND AMENDMENT ADDED MICHAEL CAPRA AS A
NAMED PARTY TO THE ORDER AUTHORIZING INTER-
CEPTION OF TELEPHONE CONVERSATIONS OVER THE
TELEPHONE NUMBER 831-9247 SUBSCRIBED TO BY
STEVE'S AIR CONDITIONING & REPAIR, 2036 SECOND
AVENUE, NEW YORK

28. The order of extension is defective for failure to contain a proper minimization clause for the reasons stated above in paragraph 10.

29. Detective Eaton's affidavit submitted in support of the August 15, 1972 application discloses that the same basis used in the order of July 12, 1972 were used to gain a further extension and amendment on August 15, 1972. (See paragraphs 3, 6E and 13):

30. Detective Eaton's opinions are again strained and incredulous regarding various conversations set forth in his affidavit and demonstrate his total lack of good faith in presenting to the magistrate reviewing the application for extension, all of the pertinent facts with regard to the conversations intercepted. For instance, paragraph 5a relates a conversation between MICHAEL and JOHN CAPRA which is interpreted by Detective Eaton to be a narcotics related conversation. It is clear from listening to the tapes that

JOHN CAPRA was inviting his brother to the fights. Paragraph 5b of Detective Eaton's affidavit relates a conversation between MICHAEL CAPRA and MRS. CAPRA, his mother, and opines that since he calls his mother, MRS. CAPRA takes messages from narcotics customers of MICHAEL and JOHN CAPRA. In fact, MICHAEL CAPRA is referring to calls from his wife and children. A complete listening to the tape recordings of the intercepted conversation demonstrates this without a shadow of a doubt. Moreover, Detective Eaton relates in paragraph 5d of his affidavit that MICHAEL CAPRA, on June 30, 1972, called his mother's home and asked whether there were "any calls for him, my daughter or anybody" and also asks whether "they'd come for the set, the air-conditioner". Paragraph 5f of Detective Eaton's affidavit relates a call from MICHAEL CAPRA to his dad which conversation Detective Eaton opines is a narcotic related conversation. However, listening to the tape recordings of the intercepted conversations clearly demonstrates that they were speaking about air-conditioning work to be done at the Capra's home, which was to be done by JIMMY RINALDI and which was never finished by RINALDI. The Capras agreed that they would have to get someone else to do the air-conditioning work.

31. The extension order was not executed in a way as to minimize the interception of conversations not otherwise subject to the order. According to the logs, the monitoring officers recorded and/or listened to all of the conversations intercepted pursuant to the above order. The foregoing, with regard to minimization, is made clear in Detective Eaton's affidavit from the fact that he admits overhearing and recording communications between MICHAEL CAPRA, his father and his mother, when neither MICHAEL CAPRA nor his father or mother were named parties to the order.

I .

EAVESDROPPING WARRANT DATED SEPTEMBER 11th, 1972, AUTHORIZING PLACEMENT OF EAVESDROPPING DEVICES AT THE GROUND FLOOR OF 1023 HAVERMEYER AVENUE, BRONX, NEW YORK, TO OVERHEAR, INTERCEPT AND RECORD THE CONVERSATIONS OF STEVEN DELLACAVA, JOHN CAPRA, MICHAEL CAPRA, LEOLUCA GUARINO AND LENNY FILIPPONE.

32. The order above is defective for failure to contain a proper minimization clause for the reasons stated above in paragraph 10.

33. The affidavit submitted in support of the September 11, 1972 application discloses the same facts used to obtain the prior orders of July 12, 1972 and August 15, 1972 (see paragraphs 7a, 7b, 7c, 7d, 7e, 7f, 7g and 7h of Detective George Eaton's July 12, 1972 affidavit and paragraphs 8a, 8b, 8c, 8d, 8e and 8f of Detective George Eaton's August 15, 1972 affidavit).

34. Detective George Eaton's opinions concerning the events in and about the neighborhood of 1023 Havermeyer Avenue as set forth in his affidavit (between July 6, 1972 and August 30, 1972) are, to say the least, incredible. For instance, he states that a person identified as LENNY FILIPPONE left 1023 Havermeyer Avenue at 10:10 P.M. on July 26, 1972 (see paragraph 5h) and drove away returning approximately ten minutes later entering 1023 Havermeyer Avenue carrying a brown paper bag. Detective Eaton opines this trip may have involved a delivery of one-half kilogram or one kilogram of narcotics, and the paper bag could have contained payment for the package. This absurd conclusion is further tainted by the fact that there is no mention that FILIPPONE was ever in possession of a package, yet this mysterious package turns up in Detective Eaton's conclusion. In paragraph 6a, Detective Eaton states that at 11:00 P.M. on August 1, 1972, GUARINO left 1023 Havermeyer Avenue carrying a small paper bag and

approached an old van parked in the street (which was painted like a mail truck). GUARINO examined the van for several minutes and then got into his car and drove away. It is Detective Eaton's opinion that GUARINO believed the van might be a surveillance vehicle and (he) wanted to satisfy himself of the same. Detective Eaton further states that this is the type of vehicle sometimes used for surveillance and that GUARINO would be aware of the same. Detective Eaton has now included mind reading into his incredible opinionating.

Detective Eaton's affidavit gets so confusing that in paragraph 6d he categorizes that on August 15, 1972, an unidentified man was a passenger in FILIPPONE'S car and remained in said car for about twenty minutes while FILIPPONE left the car and entered 1023 Havermeyer Avenue . When FILIPPONE returned to the car, he drove away with this passenger. Detective Eaton opines that this passenger was in fact a customer who did not have the required down payment or had complaints about the quality of the narcotics he was buying. How Detective Eaton could arrive at this conclusion is well beyond this affiant's wildest imagination. From the ridiculous to the sublime, Detective Eaton states that on July 12, 1972, he was informed by Detective Ward of an incident that occurred on July 17, 1972. Detective George Eaton further states that on Monday, August 28, 1972, he received information from a Detective DeMarco and Agent Brent Eaton (B.N.D.D.) of events which occurred on Tuesday, August 29, 1972.

35. Detective Eaton classifies the ground floor of 1023 Havermeyer Avenue, Bronx, New York as a social club. This is but one of hundreds of similar clubs in the Bronx which are used primarily for gatherings of ethnic groups where the members engage in card playing, watching television, etc. Detective Eaton relied solely upon his and his fellow officers' observations of innocent behavior of people frequenting the social club. In paragraph 8 of

the affidavit, Detective George Eaton states that he personally received information from a confidential informant on August 21st, August 23rd, and August 25, 1972. However, Detective Eaton's affidavit is barren of any explanation of this confidential informant's reliability. Detective Eaton simply states that the informer's name has been deleted to protect his identity and insure his personal safety. Detective Eaton states that probable cause has been established in his affidavit concerning GUARINO by the information contained in paragraphs 5e, 5f, 5j, 6a, 6b, 6d, 6e, 6f, 7a, 7c, and 7d (see paragraph 9). A thorough perusal of the aforementioned paragraphs shows nothing more than GUARINO arriving, entering and leaving 1023 Havermeyer Avenue in the evening hours on various days from July 12th to August 29, 1972. Two of the aforesaid paragraphs, 5j and 6d, do not even mention GUARINO and paragraph 7d is entirely opinion a la Eaton. There are many, many more inconsistencies concerning the above mentioned order which are too voluminous to set forth in this affidavit.

36. There are two further eavesdropping orders (October 18, 1972 extension of the Havermeyer order and February 13, 1973, the Whitestone bug) involved in the instant case, based upon the conversations intercepted as a result of the aforesaid orders. Since these remaining two orders (October 18, 1972 and February 13, 1973) are based entirely upon the information received as a result of the prior orders outlined in this affidavit, it is suggested that any conversations monitored thereto were certainly unauthorized as they are a direct result from the illegal prior orders.

J.

THE ARREST OF GUARINO ON FEBRUARY 3,
1972 WAS ILLEGAL.

37. On February 3, 1972, Detective Eaton arrested GUARINO at approximately 10:30 P.M. The arrest took place on the street in front of Rockefeller Center.

38. Detective Eaton relates the circumstances under which he arrested GUARINO in his affidavits of March 8, 1972 submitted in support of the application for an eavesdropping order on Rays Stationary Store.

(See paragraph 8) :

"The interception of conversations and the conducting of surveillance culminated on February 3, 1972 when members of the investigating team conducting this investigation with me overheard and observed conversations between DELLA CAVA and GUARINO, and DELLA CAVA and BROWN, indicating that DELLA CAVA was to arrange for the delivery of a large quantity of narcotics to BROWN, receive payment for the narcotics from BROWN, and deliver the money to GUARINO in the vicinity of Rockefeller Center. On February 3, 1972, DELLA CAVA was observed by other Special Investigating Unit Detectives to enter BROWN'S apartment and leave with a leather satchel, drive to Rockefeller Center, and deliver the satchel to LEOLUCA GUARINO, at which point they were arrested by myself and others....."

The above recital by Detective Eaton when tested by the true facts of what occurred in relation to GUARINO again demonstrates the Detective's penchant for perjury, misleading statements and half-truths. More specifically, the conversation between DELLACAVA and GUARINO which indicated to Detective Eaton that DELLACAVA was to "deliver the money to GUARINO" is not set forth in the affidavit. It is, however, set forth in Detective Eaton's June 9, 1972 affidavit submitted in support of the eavesdropping order on "Steves Air Conditioning". The conversation is innocent and innocuous:

"DELLA CAVA: Hello

GUARINO: Yeah

DELLA CAVA: Figure about an hour, where you gonna be

GUARINO: I'm be down a Rainbow Grill

DELLA CAVA: Ahhh how am I gonna get to you there

GUARINO: About an hour

DELLA CAVA: Yeah, I'll be a, I'll be west, these ain't no place on the East side over there you can?

. . .

DELLA CAVA: Uh how about meeting me on a, a, what's that avenue now? 5th Avenue, right in front of where the statue is, you know where the statue is in Rockefeller Center

GUARINO: Yeah

DELLA CAVA: Meet me right there

GUARINO: What time?

DELLA CAVA: Well 10 to 10:30

GUARINO: Okay

DELLA CAVA: Quarter after 10, so it gives you time

GUARINO: Alright good "

Prior to that conversation, according to the logs provided by the Government, GUARINO and DELLACAVA had been overheard speaking on the phone at Dianas Bar for the first time on December 16, 1971 at 2012. That conversation, in addition to being an illegal interception, was marked "n.p." or non-pertinent by the monitoring officer. They were next overheard on that phone on December 22, 1971 at 1210, again illegally. Moreover, the conversation was apparently not important enough to transcribe. On January 7, 1972, DELLACAVA calls GUARINO over the phone that "that guy called". Other conversations of GUARINO were intercepted on the bar phone with "Mr. Guarino" (January 7, 1972), "Jackie" (January 7, 1972), "Joe"

(6) (January 7, 1972), "Frank" (January 7, 1972), (7) "Male" (January 13, 1972), (8) "Jap" (January 15, 1972), (9) "Female" (January 21, 1972). None of the above conversations were transcribed or referred to by Detective Eaton in his affidavits as each of them contained innocent and innocuous conversation. Accordingly, there is no factual basis for Detective Eaton's conclusory statement that he "overheard conversations....indicating that DELLACAVA was to ... deliver the money to GUARINO."

39. Detective Eaton mis-states a second material element of fact. He states he observed DELLACAVA "deliver the satchel to LEOLUCA GUARINO". In fact, no such observation was made for both GUARINO and DELLACAVA were arrested while GUARINO was speaking to DELLACAVA through DELLACAVA'S car window. Nothing was ever given to GUARINO prior to his arrest and in fact, the "satchel" was seized from the closed trunk of DELLACAVA'S car after the arrest.

40. Accordingly, since the facts indicate that GUARINO was arrested only because he was in the company of a suspect, the arrest was illegal.

WHEREFORE, it is respectfully requested that this application be granted in all respects and that this court provide further relief as to it is just and proper.

Sworn & Subscribed to before
me this 6th day of September, 1973.

Barbara A. Bieber
BARBARA A. BIEBER
A Notary Public of New Jersey
My Commission Expires 10/20/76.

[Signature]
DENNIS D. S. McALEVY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

JOHN CAPRA,
LEOLUCA GUARINO,
STEVEN DELLA CAVA,

Defendants.

STATE OF NEW YORK :
 : ss.
COUNTY OF NEW YORK :

STEVEN DELLA CAVA, being duly sworn deposes and says:

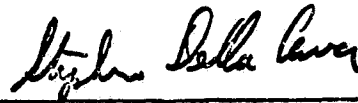
1. This affidavit is submitted in support of motions made by me and defendants, CAPRA and GUARINO, for suppression of evidence in the possession of the Government as the result of electronic eavesdropping on Diane's Bar and Steve's Air Conditioning.

2. "Diane's Bar" and Steve's Air Conditioning", were, during the period of the electronic surveillance, owned by myself and the defendants CAPRA and GUARINO. Each of us had control over the premises in which the bar and air conditioning business were conducted. The telephones located therein were used by us for the purpose of private and business calls.

3. The Government was aware of my ownership. (See Detective Eaton's affidavit of September 8, 1972, submitted in support of the Havermeyer "bug", at paragraph 8, page 17.)

4. I am informed by my attorney and do believe that said electronic surveillance violated my rights protected by the First, Fourth, Fifth, Sixth and Ninth Amendments to the United States Constitution.

WHEREFORE, it is respectfully requested that the evidence in the possession of the Government gained as a result of said electronic surveillance be suppressed.



STEVEN DELLA CAVA

Sworn to before me this

_____ day of September, 1973.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

JOHN CAPRA
LEOLUCA GUARINO
STEVEN DELLA CAVA,

Defendants.

STATE OF NEW YORK :
: ss.
COUNTY OF NEW YORK :

LEOLUCA GUARINO, being duly sworn deposes and says:

1. I have read the affidavit of STEVEN DELLA CAVA, submitted herein and I have discussed the matter with my attorney.
2. I adopt the contents of that affidavit as if the contents thereof are fully set forth herein.

WHEREFORE, it is respectfully requested that the aforesaid evidence be suppressed and other evidence gained as a result thereof be similarly suppressed.


LEOLUCA GUARINO

Sworn to before me this


day of September, 1973.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

JOHN CAPRA,
LEOLUCA GUARINO
STEVEN DELLA CAVA,

Defendants.

STATE OF NEW YORK :
: ss.
COUNTY OF NEW YORK :

JOHN CAPRA, being duly sworn, deposes and says:

1. I have read the affidavit of STEVEN DELLA CAVA submitted herein and I have discussed the matter with my attorney.

2. I adopt the contents of that affidavit as if the contents thereof are fully set forth herein.

WHEREFORE, it is respectfully requested that the aforesaid evidence be suppressed and other evidence gained as a result thereof be similarly suppressed.


JOHN CAPRA

Sworn to before me this

day of September, 1973.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

LEOLUCA GUARINO,

Defendant.

STATE OF NEW YORK :
: ss.:
COUNTY OF NEW YORK :

LEOLUCA GUARINO, being duly sworn, deposes and says:

1. He is a defendant in the above entitled action and submits this affidavit in support of the within motion to suppress evidence seized as a result of electronic surveillance.

2. He has discussed this matter with DENNIS McALEVY, his attorney, and has been informed that his voice is heard on tape recordings made as a result of interception of conversations of the Diane's Bar, Ray's Stationery, Steve's Air Conditioning, 1023 Havermeier Avenue and Whitestone, Queens.

3. He had no knowledge of, nor did he consent to the interception of his conversations or any others and did not receive notice pursuant to the relevant Federal and State statutes of said interceptions; he has been informed by his attorney that said interceptions and recordings were made on at least three occasions at a time when he was not a named party on an eavesdropping warrant and at a time when he was not talking to a named party on an eavesdropping warrant - specifically when the Court ordered that only conversations of JOSEPH DELLA VALLE and others should be recorded. He did not, nor has he ever, spoken to JOSEPH DELLA VALLE on the telephone.

4. His attorney has advised him that his Fourth, Fifth, Sixth and Ninth Amendment rights of the Constitution of the United

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

73 CR 460

John Capra
LEOLUCA GUARINO, et als.,
Steven Della Cava Defendants.

PLEASE TAKE NOTICE that upon the annexed affidavits of STEVEN DELLA CAVA, LEOLUCA GUARINO and JOHN CAPRA sworn to the 5th day of September, 1973 and upon the affidavit of BARRY I. SLOTNICK, ESQ. previously submitted herein, the undersigned will move this Court, at the United States Court House, Foley Square, New York, New York for an Order pursuant to Rule 41 E of the Federal Rules of Criminal Procedure suppressing evidence in the possession of the Government and all other evidence gained as a result thereof, and for a hearing in respect thereto and for such other relief as to the Court is just and proper.

Yours, etc.

BARRY I. SLOTNICK, ESQ.
Atty. for Defendant, CAPRA.
15 Park Row
New York, N.Y. 10038

DATED: New York, New York
September 5, 1973

DENNIS D. S. McALEVY, ESQ.
Atty. for Defendant, GUARINO
921 Bergen Avenue
Jersey City, N.J. 07306

LAWRENCE K. FETTEL

-against-

Defendants.

STEVEN DELLA CAVA, being duly sworn, deposes and says:

2. I have discussed this matter with my attorney and he has informed me that Counts "Four" and "Five" charge me together with the defendants CAPRA and GUARINO , with unlawful possession and distribution of heroin and cocaine in or about the month of October, 1971. He further advises me that the heroin and cocaine referred to in those Counts was seized by the police on or about October 28, 1971 from a bag which was opened and searched by the police at the Toledo Railroad Station and that the Government will seek to offer that heroin and cocaine as proof of our possession and distribution.

3. The aforesaid bag was searched and it and its contents were seized by the police without a warrant of search or seizure, and without

probable cause.

4. The aforesaid search of the bag and its seizure together with its contents were made in violation of rights personal to me and the defendants CAPRA and GUARINO, which rights are protected by the Fourth Amendment to the United States Constitution.

5. That our rights were violated is clear from the following:

The bag which was searched by the police in Toledo was owned by me together with the defendants CAPRA and GUARINO at the time of the aforementioned Toledo search and seizure.

WHEREFORE, it is respectfully requested that the aforesaid evidence be suppressed and other evidence gained as a result thereof be similarly suppressed.


STEVEN DELLA CAVA

Sworn to before me this day
of September, 1973.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

JOHN CAPRA,
LEOLUCA GUARINO,
STEVEN DELLA CAVA.

Defendants.

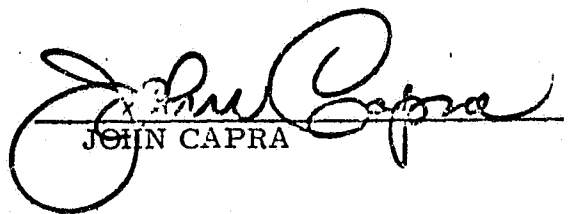
STATE OF NEW YORK :
 : ss.
COUNTY OF NEW YORK ::

JOHN CAPRA, being duly sworn, deposes and says:

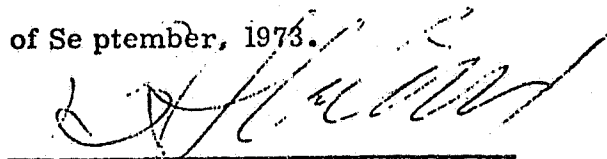
1. I have read the affidavit of STEVEN DELLA CAVA, submitted herein and I have discussed the matter with my attorney.

|| 2. I adopt the contents of that affidavit as if the contents thereof are fully set forth herein.

WHEREFORE, it is respectfully requested that the aforesaid evidence be suppressed and other evidence gained as a result thereof be similarly suppressed.


JOHN CAPRA

Sworn to before me this ¹⁴ day
of September, 1973.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

JOHN CAPRA,
LEOLUCA GUARINO,
STEVEN DELLA CAVA.

Defendants.

STATE OF NEW YORK :
:ss.
COUNTY OF NEW YORK :

LEOLUCA GUARINO, being duly sworn deposes and says:

1. I have read the affidavit of STEVEN DELLA CAVA, submitted herein and I have discussed the matter with my attorney.

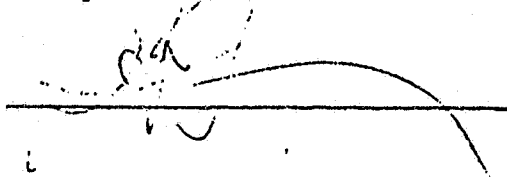
2. I adopt the contents of that affidavit as if the contents thereof are fully set forth herein.

WHEREFORE, it is respectfully requested that the aforesaid evidence be suppressed and other evidence gained as a result thereof be similarly suppressed.


LEOLUCA GUARINO

Sworn & Subscribed to

before me this 17 day
of September, 1973:



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

78 CR 460

LEOLUCA GUARINO, et als.

Defendants.

PLEASE TAKE NOTICE that upon the annexed affidavit of BARRY IVAN SLOTNICK, dated the 5th day of September, 1973, the undersigned will move this Court at the United States Court House, Foley Square, New York, New York for an Order admitting DENNIS D. S. McALEVY, ESQ., pro hoc vice, as attorney for LEOLUCA GUARINO, in the matter of United States of America vs. John Capra, et als., 73 CR 460, and for such other and further relief as to the Court is just and proper.

Yours etc.

Dated: New York, New York
September 5, 1973.

BARRY IVAN SLOTNICK, ESQ.
Attorney for Deft., CAPRA
Office & P.O. Address
15 Park Row
New York, New York 10038

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

73 CR 460

-against-

LEOLUCA GUARINO, et als.

Defendants.

STATE OF NEW JERSEY:

ss.

COUNTY OF HUDSON :

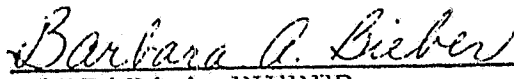
DENNIS D. S. McALEVY, of full age, being duly sworn
according to law upon his oath, deposes and says:

1. I am admitted to practice in the State and Federal Courts
of the State of New Jersey.
2. I have been retained by LEOLUCA GUARINO who is a
defendant in the above stated indictment.
3. I have been informed by Vincent Lanna, Esq. that he can
no longer represent Mr. Guarino in this matter due to a conflict with
other trials in which Mr. Lanna is involved.
4. Mr. Lanna is aware of the fact that Mr. Guarino has
retained me and consents fully to my being substituted in the place and
stead of Vincent Lanna, Esq., in the instant case.

Sworn & Subscribed to


DENNIS D. S. McALEVY

before me this 6th day of Sept., 1973.


BARBARA A. BIEBER
NOTARY PUBLIC OF N.J.
MY COMMISSION EXPIRES 10/20/76.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

73 CR 460

-against-

LEOLUCA GUARINO, et als.,

Defendants.

STATE OF NEW YORK :
: ss.
COUNTY OF NEW YORK :

BARRY IVAN SLOTNICK, being duly sworn, deposes and
says:

1. I am admitted to practice in the highest court of the State
of New York, the District Courts in the City of New York and the Supreme
Court of the United States.

2. I hereby move for the admission of DENNIS D. S. McALEVY,
ESQ., pro hoc vice, for the purpose of representation of LEOLUCA
GUARINO in the matter of United States of America vs. John Capra, et als.,
(73 CR 460).

3. Mr. McAlevy is known to me as a member of the State and
Federal bars of the State of New Jersey and a man of good moral character.

4. I hereby affirm the aforementioned under the penalties of
perjury.

Dated: New York, New York
September 3, 1973.


BARRY IVAN SLOTNICK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

UNITED STATES OF AMERICA,

v.

72 CR 460

LEOLUCA GUARINO,

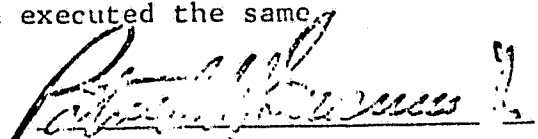
Defendant.

PLEASE TAKE NOTICE, that the undersigned defendant
LEO LUCA GUARINO , hereby consents to the substitution of
DENNIS Mc ALEVY, of 921 Bergen Avenue, Jersey City, New Jersey,
as my attorney in the above entitled proceeding in place and
in stead of VINCENT LANNA, and that he is to act as my attorney
in all respects henceforth in this proceeding.


LEOLUCA GUARINO

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

On the 31st day of July 1973, before me personally
came LEO LUCA GUARINO to me known and who executed the foregoing
document and acknowledged that he executed the same.


Notary Public State of New York
No. 154340

GAF

art

73-1280

September 7, 1973

Honorable Marvin E. Frankel
United States District Judge
United States Courthouse
Foley Square
New York, New York

Re: United States v. Capra
73 Cr. 460

Dear Judge Frankel:

Pursuant to the memorandum for minimization hearing dated September 5, 1973, we provide the following information:

The Government has decided to refrain from offering any conversations intercepted by the bugs at 1023 Havermeyer Avenue, Bronx, New York and 9-20 166th Street, Whitestone, New York. The only electronic surveillance evidence which the Government proposes to tender is certain conversations intercepted pursuant to the wiretap on Telephone number 722-9595 located at 2034 2nd Avenue, New York, New York ("Diane's Bar").

The initial order dated December 8, 1971 authorizing the wiretap on Diane's Bar was secured on the basis of affidavits which did not directly rely on any prior electronic eavesdropping. A confidential informant described in the supporting affidavits supplied part of the probable cause for this application.

GAF:art
73-1280

Honorable Marvin E. Frankel

-2-

As set forth in the affidavit of Detective George Eaton at 73, the informant was arrested in April, 1971. We are informed that this arrest resulted from information obtained from a court-authorized wiretap on Telephone number (516)293-2072 located at 104 Lockwood Avenue, Farmingdale, Long Island and Telephone number (515)293-2372 located at 300 Main Street Farmingdale, Long Island. Copies of the order for this wiretap and the application therefor have been supplied to the Court and interested defense counsel.

The Government contends that any analysis of this wiretap is legally irrelevant to the admissibility of any evidence obtained from the wiretap at Diane's Bar. Since no conversations of any defendants in this case were intercepted on this wiretap, they unquestionably lack standing to challenge its legality. E.g. Alderman v. United States, 394 U.S. 165, 171-176 (1969); United States v. Poeta, 455 F.2d 117, 122 (2d Cir.), cert. denied, 405 U.S. 948 (1972). The informant is the only individual in any way connected with this case who arguably might have standing to raise such issues. See United States v. Hess, Dkt. Nos. 73-1920, 73-1931, 73-1945 (2d Cir., June 26, 1975).

Very truly yours,

PAUL J. CURRAN
United States Attorney

By: Gerald A. Feffer
GERALD A. FEFFER
Assistant United States Attorney

Honorable Marvin E. Frankel

-3-

CC: Leonard J. Levinson, Esq.
111 Park Place
New York, New York

Edward Panzer, Esq.
299 Broadway
New York, New York

John Curley, Esq.
Legal Aid Society
Federal Defender Services Unit
15 Park Row
New York, New York

Stuart Holtzman, Esq.
233 Broadway
New York, New York

Joseph I. Stone, Esq.
277 Broadway
New York, New York

Marion Gaines Hill, Esq.
209 W. 125th Street
New York, New York

Lawrence Feitel, Esq.
1450 Broadway
New York, New York

Dennis D.L. McAleoy, Esq.
921 Bergen Avenue
Jersey City, New Jersey

Barry Slotnick, Esq.
15 Park Row
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICROFILM

NOV 28 1973

UNITED STATES OF AMERICA,

-against-

JOHN CAPRA, et al.,

Defendants.

#40047
73 Cr. 460

MEMORANDUM

Re: Defendant Della Cava

FRANKEL, D.J.

Defendant Della Cava, named in a warrant under the instant indictment charging conspiracy to commit narcotics violations and substantive narcotics offenses, was arrested on the early morning of April 11, 1973. The arrest was made when he stopped his automobile for a red light at Lexington Avenue and East 86th Street in New York City and agents who had been following intercepted his vehicle with theirs. The arrest was part of a large-scale "roundup" of alleged narcotics violators in and around New York City. Della Cava had been under surveillance for 15 minutes or so before the arrest, beginning when he emerged from

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S.D. N.Y.

Bachelors III, a restaurant and bar on Lexington Avenue in the east sixties, and walked some two or three blocks north to enter his auto. The arresting officers had determined, however, that the arrest should be made, if possible, at a substantial distance from Bachelors III to avoid alerting other persons scheduled for apprehension in the same operation.

Following his arrest, Della Cava was searched quickly on the scene. As strangers began to gather, the arresting officers took him and his automobile to an underground Sanitation Department garage in the area of West 79th Street and the Hudson River. There, Della Cava's auto was searched. Taking his keys, the officers opened the trunk, where they found, inter alia, a brown gym bag and a machine for sealing plastic bags or containers. In the bag, the officers found \$13,999 in currency. Later laboratory examination revealed traces of heroin in the bag.

There was no search warrant, and Della Cava did not consent to the search. Contending that the search was illegal, he moves for suppression of the items found in the car trunk.

As a first ground, Della Cava claims that the arrest was deliberately delayed to supply a pretext for searching the vehicle. The contention is not supported by the record. On the contrary, the evidence is convincing that the officers were prompted by valid concerns about the effectiveness of their overall arrest assignments and about possible physical dangers if confederates were prematurely alerted. The court has become convinced, not only in the hearing relating to the instant motion, but in allied pretrial hearings, that the network of communications among arrest targets was a wide and swift one. The precautions attending Della Cava's arrest were reasonable and sensible, not pretextual. See McKnight v. United States, 183 F.2d 977 (D.C. Cir. 1950).

There remains the question whether the warrantless search was "reasonable" by Fourth Amendment U.S. standards. See Cady v. Dombrowski, 41/L.W. 4993, 4996 (June 21, 1973). On this subject of automobile searches, which has not produced a simple and symmetrical jurisprudence, it may not be

astonishing that law enforcement officers and counsel lack neat or entirely consistent theories. One officer's report described the search as "incident" to the arrest, but this is not much argued now. The main theory of justification now is that it was an "inventory search," designed to protect both the owner (in his property rights) and the arresting officers (against false charges of depredation). But this justification has little or no support in the record.

Nevertheless, looking at the time, place, and other circumstances of the search, the court finds it reasonable. The vehicle, taken in a narcotics arrest, was thought by the arresting officers to be on its way to being "impounded." The thought was a cogent one; the automobile could readily have been thought subject to forfeiture, and perhaps should have been labeled for that purpose, though it was not. The forfeiture statute, 49 U.S.C. §781 et seq., makes it unlawful to transport or possess in any vehicle, or to use any vehicle

to facilitate the transportation, or possession of, contraband. Any narcotic drug which has been acquired or is possessed in violation of any laws of the United States dealing therewith is specifically defined as contraband. §781(b)(1). Subject to several exceptions, not material here:

"Any * * * vehicle * * * which has been or is being used in violation of any provision of §781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited * * *."
49 U.S.C. §782.

Under this statute, therefore, federal officers have a right and duty to seize a vehicle when they have reasonable cause to believe it "has been or is" being used in violation of the law in the transportation of contraband. There is a corollary right to search such a lawfully seized vehicle. See Cooper v. California, 386 U.S. 58 (1967); Carroll v. United States, 267 U.S. 132 (1925); United States v. Francolino, 367 F.2d 1013, 1018-23 (2d Cir. 1963) (alternative holding), cert. denied, 388 U.S. 960 (1967); Davida v. United

States, 422 F.2d 528, (10th Cir.), cert. denied, 400 U.S. 821 (1970); United States v. Ayers, 425 F.2d 524, 530 (2d Cir.), cert. denied, 400 U.S. 842 (1970); United States v. Lewis, 303 F. Supp. 1394, 1396-97 (S.D.N.Y. 1969).¹

In the case at hand, it is evident that the officers had reasonable cause to believe at the time of the arrest that the vehicle was being (or had been) used in violation of the law regarding transportation of contraband and,

1. See also the Controlled Substances Act of 1970, 21 U.S.C. §801 et seq., which provides, subject to exceptions not material here, for the forfeiture of all vehicles "which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment" of illegally manufactured, distributed, or acquired controlled substances or of raw materials, products and equipment used in the illegal manufacture and delivery of controlled substances. §881(a)(4). Any property subject to forfeiture may be seized by the Attorney General upon process, although seizure without process may be made when --

"the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant." §881(b)(1).

The regulations promulgated under this section, 31 C.F.R. §316.71 et seq. (1973), authorize all special agents of the Bureau of Narcotics and Dangerous Drugs to seize such property

Therefore, was subject to seizure. Although at the pre-trial hearing, the officers tended to downplay their knowledge of Della Cava's alleged involvement in narcotics activities as well as their interest in his vehicle, the realities seem clear enough. Agent Samuels, while working on this particular case for only a month, had learned of Della Cava in a drug context some eight months earlier. Similarly, Detective Eaton had been involved since late 1971 in the investigation which led to the indictments. During that time Eaton had conducted surveillance of this defendant, had monitored wiretap conversations indicating narcotics transactions (including vehicular transportation), and had participated in a prior arrest of this defendant for a narcotics violation. Finally, and not insignificantly, the indictment under which Della Cava was being arrested added to the pertinent showing of "probable cause." Given these circumstances the officers had reason to believe that the defendant's vehicle was subject

Footnote 1 cont'd

as may be subject to seizure. Id. §316.72,

to seizure under 49 U.S.C. §782.

viewing the occasion as we should, from the vantage point of the officers on the spot, we are led to hold that the search "was closely related to the reason [Della Cava] was arrested, the reason his car had been impounded, and the reason it was being retained." Cooper v. California, 386 U.S. 58, 61 (1967).³

The court concludes, in sum, that the

2. The fact that forfeiture proceedings were not instituted is pertinent but not decisive; the key inquiry is what were the powers of the officers in the light of what they knew and reasonably believed at the time of the search. See Lockett v. United States, 390 F.2d 168, 172 (9th Cir.), cert. denied, 393 U.S. 877 (1968). Although the officers testified that they were "impounding" the vehicle for "safekeeping," their rationale for their right to seize and search the vehicle is not conclusive. "Officers of the law cannot be held to know all of the niceties of the law and if it is determined that their actions have the sanction of the law, such actions are completely legal for all purposes." David v. United States, 422 F.2d 528, 531 (10th Cir.), cert. denied, 400 U.S. 821 (1970).
3. In Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Court impliedly recognized that the presence of contraband may justify a warrantless search of a vehicle. Distinguishing Carroll v. United States, the Court noted that the facts of Coolidge involved "no contraband or stolen goods or weapons * * *." Id. at 462.

question is a close one, but that the search should on ~~the~~ balance be held lawful. Compare Evans v. United States, 385 F.2d 824, 825 (7th Cir. 1967), with United States v. Stevenson, 409 F.2d 354, 357 (7th Cir. 1969). Our doubts are perhaps justified by the uncertain state of the controlling authorities. What seems more clear is that police officers do not behave unreasonably when they resolve close questions of this kind in the fashion here presented. Given the somewhat limited "privacy" interest of Della Cava in his auto trunk on the occasion in question, Cady v. Dombrowski, 41 U.S. L.W. 4895, 4997 n.* (June 21, 1973), this court is unable to conclude that the things found there must be barred from consideration as evidence.

The motion to suppress is denied. So ordered.

United States District Court, New York, New York
October 16, 1973

Marvin E. Fraubel
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
UNITED STATES OF AMERICA,

-against-

JOHN CAPRA, et al.,

Defendants.

----- x

73 Cr. 460

MEMORANDUM ON PRETRIAL
PUBLICITY

FRANKEL, D.J.

The events leading to the trial in this case included actions by law enforcement officers resulting in massive and lurid publicity for their activities. The defendants herein were among scores taken in a "roundup" in the night and morning of April 13-14, 1973. The numerous arrests were supposedly to be accomplished with the utmost secrecy. Yet press reporters and photographers were invited to be present, and at work, through all the stages of the operation.

On the night of April 13, 1973, the officers

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scheduled to participate in the arrests assembled for instructions in a carefully cloaked meeting at the headquarters of the Bureau of Narcotics and Dangerous Drugs (BNDD). The watchword, we are told, was D-Day style security. However, those in attendance included newspaper and magazine photographers and reporters, busily taking photographs of the officers, not omitting high-ranking police officers and top members of the United States Attorney's staff.

As the arresting officers fanned out for their missions throughout the New York metropolitan area, media people went along. Some of the official vehicles (it is not clear how many) carried photographers and reporters as well as the law enforcement people who must be presumed to have been the only ones properly authorized to be in such vehicles at such a time.

It appears that one or more reporters actually entered the homes of arrestees with the officers so that they might describe the detailed circumstances of the arrests, home furnishings, and other essentials that the people are said to have a right to know.

There was little if any serious violence attending the arrests, but action scenes were caught and recorded in the exuberant flashing of camera lights. The arrested people were photographed coming from their homes, clubs, and elsewhere. Cameramen, all duly alerted, were ready at BNDD headquarters and elsewhere to show the arrested people, including an old lady, variously handcuffed, "struggling" in the fierce grip of official hands on each arm, attempting to conceal their faces, or otherwise portraying their roles in the drama.

The press in this area had a ball for a couple of days in the week subsequent to the arrests. The roundup was described in intimate, paperback detail - the tension of the secret briefings, the bantering of officers all wound and ready to spring, the long accounts of patient sleuthing leading to this finale. There were the usual references to "reputed organized crime figures." A reporter for the sedate Times captured on the front page the "sense of exhilaration." He told how many of the arresting officers were themselves kept in the dark until the very last minute. A Deputy Police Commissioner

was quoted as saying on the critical evening before the arrests:

"We cannot have a leak. We cannot have a leak now. This is a historic night. So I want to wish each of you good luck."

Reflecting further this sense of history, the same high official was quoted in another press organ as saying the roundup made "the French Connection case look like a pebble compared to a boulder." Months later, at the trial of the instant case, a government chemist was to exhibit a similar instinct for what counts in history. Asked about a crude testing device for heroin, he found it useful as a scientist to compare it to devices seen in the motion picture, "The French Connection." The expectable motion for a mistrial was denied then, as have been other arguments to defeat this prosecution, but matters of this kind may yet take on a more sinister aspect when viewed from some appellate height. It is to be questioned in any event how clearly the ends of justice are perceived in an atmosphere where it has become so habitual to hold the mirror of nature up to Hollywood's art.

Other details of the publicity may be omitted

for present purposes. They are in the court's record for reference on review and otherwise.¹

Enough has been mentioned to make clear, it might be thought, why the court found in these matters grounds for concern. The troublesome problem of reconciling freedom of the press with the right to a fair trial is familiar to everyone. This court, like others, has a rule on the subject, which appeared very possibly to have been violated.²

The Department of Justice also has a commendable-sounding rule, which might be read to proscribe press briefings and photographic arrangements for "secret" arrests on serious indictments.³ The question of the integrity of the Department's own functioning might have been supposed to cause concern in that quarter, quite apart from the now familiar principle that an agency may deny due process if it fails to obey its own regulations. E.g., United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 266-68 (1954); Service v. Dulles, 354 U.S. 363, 388-89 (1957); Yellin v. United States, 374 U.S. 109, 120-21 (1963).

As for the court itself, our "supervisory power," if it means something, must entail an alert sensitivity to indications that the federal prosecutor and/or federal law enforcement officers have participated in, or quietly condoned, transgressions against court rules, executive rules, and commands of the Constitution.

Accordingly, after the verdicts had been returned in this case, the court, in a memorandum dated November 27, 1973, directed the United States Attorney to explain and comment upon the above-described events. Specific questions were put to develop some facts about the publicity, the roles of government counsel and law enforcement officers, the views of the government as to whether there had been improprieties, and the possible needs for remedial action by the United States Attorney, the court, or both. Defense counsel were invited, of course, to present their positions.

Perhaps surprisingly, at least to this court, the initial response of the United States Attorney was a five-page letter explaining why no response should

be required on the merits of the questions. First of all, in a probably accurate observation, the United States Attorney took issue with the statement in our November 27 memorandum that the subject of publicity had been "left for further consideration at a later time." Whatever the court may have had in mind, it does not appear that any formal "reservation" of this nature was made on the record. Then the United States Attorney reminded us that the usual precautions had been taken in selecting the jury; that the required assurances had been given by those selected; and that there were no grounds in our record for claims of error in this respect. It was said that "[i]f an inquiry relating to pre-trial publicity were ever appropriate in this case, surely it could have been conducted before and not after the conclusion of a five-week jury trial."⁴

The demurrer was overruled. The United States Attorney then proceeded to give his responses to our inquiries. In the paragraphs following this one, we set out, first, each of the eight numbered categories of information called for by the court, then the respective submissions in response from the United States Attorney, in full or essential part,

and thereafter the court's comments in instances where comments have seemed appropriate.

"(1) A listing of the media representatives (reporters, photographers, and any others) who were present at the assembly of law enforcement officers on the night of April 13, 1973, at B.N.D.D. headquarters, or at any other such meeting, where instructions for the arrests were given."

Response: "No media representatives were present at any meeting 'where instructions for the arrests were given.' Three reporters and two photographers were present for a limited time at an assembly of law enforcement officers at Drug Enforcement Administration ('DEA') headquarters, 555 West 57th Street, New York, N.Y. . . . Their limited presence and the reasons for it are set forth in No. 6, below."

Comment: Defendants in answer point out that the press stories appearing soon after contained what purported to be detailed police information: e.g., as to an arrestee having a machine gun, as to the total number to be arrested, as to conversations

about their mission among the police officers.

The New York Times, on its front page for Tuesday, April 17, 1973, purported to quote and describe first-hand the address of the BNDD Assistant Regional Director outlining to the assembled officers things like the composition of the arresting teams, the use of code names and armbands, the location of his own command post, the procedure for handling prisoners, and other items of instruction. The United States Attorney's brief assurance may be literally consistent with all this, but it does not necessarily volunteer a rounded picture. If the details were vital for the present, we would surely require the evidentiary hearing defendants propose (note 1, supra).

"(2) A listing of such representatives, along with an indication of their respective media, who accompanied arresting officers on their arrest missions of April 13-14."

Response: Three named journalists "accompanied law enforcement personnel on the arrest of John Capra only."

Comment: This is presumed to be literally true, provided we take pains, as the United States Attorney evidently did, to read the court's question as referring only to the few "arrest missions" involved directly in the instant case. However, the newspaper accounts showed that journalists fanned out all over the metropolitan area, obviously knowing where to go (or being taken), to cover other arrests, which were then recounted in colorful detail as well as in photographs.

"(3) A list of the names of those supervisory personnel of the law enforcement agencies who authorized the presence of these media representatives."

Response: Presence of media representatives was authorized by the Chief of Domestic Enforcement of the Drug Enforcement Administration and New York City's Deputy Police Commissioner for Organized Crime Control.

"(4) A statement as to whether the United States Attorney or his representatives joined in such authorizations."

Response: "No."

Comment: Good.

"(5) If the answer to "(4)" is no, a statement whether responsible members of the United States Attorney's office (a) knew of, (b) acquiesced in, or (c) opposed such participation by media representatives. If there was opposition, state who expressed it and how."

Response: The Chief of the United States Attorney's Narcotics Unit and an Assistant United States Attorney, destined to try the instant case, were at the briefing session. Fifteen minutes before it began the Narcotics Unit Chief "learned for the first time that media representatives were to attend the session. [He] expressed disapproval to

[the Drug Enforcement Chief and the Deputy Police Commissioner] but was assured by [the latter] that their presence was necessary in order to avoid 'leaks.'

[The Commissioner] told [the Narcotics Unit Chief] that he had commitments from the heads of the newspapers involved that this would prevent news of the arrests from being prematurely leaked. [The Unit Chief] was not told nor did he learn until well after the events that media representatives were permitted to accompany law enforcement personnel on the arrest of John Capra."

Comment: This ought to be recognized to be as unacceptable as it is disheartening. Such a record of feeble, ineffectual protest is not more reassuring than the report about the strategy for dealing with "leaks." Have we indeed become so impotent that we must open the floodgates to selected press people to prevent leaks? Does the United States Attorney, who reports this without comment, believe this is the best we can do? Holmes was surely right when he said judges are naive. Perhaps it is better so. But we must be permitted to hope that resignation to the disaster here described may not be compelled. At a minimum we would wish to go back

to our English mentors to consider how they, merely human, manage this business so much better.

"(6) A statement by the United States Attorney as to whether the participation of media representatives should be deemed to have been proper."

Response: "In the light of the considerations disclosed to this office after the fact, I cannot say that the limited presence of media representatives at this briefing session was illegal or improper.

"With respect to accompanying law enforcement personnel on the arrest set forth in No 2, above, under the circumstances as I understand them, I regard this as ill-advised and would not have approved of it. However, defendant Capra was not prejudiced in his right to a fair trial by this development.

"The facts and considerations on which my answers to this question are based are set forth in [a Drug Enforcement Administration] report of May 21, 1973 to then United States Attorney Whitney North Seymour, Jr., a copy of which

is attached."

Comment: This vies with the two succeeding responses for the position of most discouraging. We are told in effect that the kind of glamorized, adventure-story press accounts preceding the instant trial may be expected to recur. It is perhaps a small answer, but enough for now from a nisi prius judge, to say that repetitions of such performances, now that the matter has been considered in all its gravity, should lead to sterner and more positive action by the court than mere expressions of disapproval. In the meantime, we invite further study by the United States Attorney, hopeful that such attention may produce sharper restrictions at the law enforcement sources upon these varieties of press coverage.

"(7) A statement by the United States Attorney as to what remedial action, if any, he has taken or proposes to take. State, for example, whether consideration has been given to the institution of contempt or other proceedings under this Court's Criminal Rule 8."

Response: "Shortly after these arrests Whitney North Seymour, Jr., then United States Attorney, expressed disapproval to [DEA's Domestic Enforcement Chief], based upon the press coverage, of the manner in which arrests were handled insofar as the press was concerned and requested [the latter] to supply a full written report about the press coverage surrounding the execution of the arrests and during the period preceding the arraignment. As noted in No. 6 above, 1973 [the latter's] report dated May 21, /is attached.

This constitutes the remedial action taken by the United States Attorney concerning this matter. No consideration has been given by this office to the institution of contempt or other proceedings under Rule 8 of Criminal Rules of this Court, since Rule 8 by its terms applies only to lawyers and courthouse personnel."

Comment: The "remedial action" is unimpressive. Mr. Seymour is to be commended for his concern in this, as in other things. It is striking, however, that nothing whatever seems to have been done at any higher level. After all, both the Drug Enforcement Administration and the United States Attorney are under

the Department of Justice. We might have hoped that some top official in the Department, its regulation (note 3, supra) having been flouted, would have taken steps to back up the vain expressions of "disapproval" by the United States Attorney. It may be imagined that steps will yet be taken. If they are not, this case may become part of a demonstration that the courts must move against the evil with such weapons as they have available.

"(8) A statement of position as to what remedial action, if any,

should be taken by the court."

Response: "It is the Government's position that under the circumstances no remedial action by the Court is warranted. However, in order to avoid any possible future problems of this nature, it may be in order for the Court to consider recommending that Criminal Rule 8 of this Court be amended to apply to appropriate investigative agencies in addition to lawyers and courthouse personnel."

Comment: Again, the court regrets that our executive officers deem themselves unwilling or unable to clean their own houses. Creative voices tell us

have been infected by the publicity of some months
prior.

At the same time, it seems fitting to underscore that the mere gnashing of judicial teeth should not remain the sole response to such law enforcement behavior. We hear a lot these days about the subversion of law and order by rules like that of Mapp v. Ohio, 367 U.S. 643 (1961), excluding good evidence "merely" because it was lawlessly gotten. The prisoner must not lightly be freed because the constable has blundered. On the other hand, if the constable assures that he can do no other than blunder some more, the time must come when we either surrender our professed rights or enforce them as well as we can.

The United States Attorney scarcely embraces the whole of the matter when he concludes in this case that this particular trial has not been demonstrated to have been vitiated by sordid publicity. We assure trial juries every day that an indictment may not be taken as evidence. We mean that in a profound sense even though we expect our grand juries to have evidence before they indict. But the atmosphere and our principles

are polluted if the indictment and arrest become the circuses they too often are, complete with prosecutors' press conferences and photographic spreads.

This court will expect that the response of the United States Attorney to these cautionary reminders will be consonant with the traditions of his great office.

Dated: New York, New York
January 8, 1974

Maurin E. Frankel
U.S.D.J.

FOOTNOTES:

1. Defendants request a hearing to develop more fully the details of the publicity and of governmental participation in generating it. As is suggested below, the court is not persuaded that the account we have is by any means complete. The request is denied, however, on the premise that further elaboration of the facts would not alter the conclusion that the court should not attempt any specific form of remedial action at this time.
2. Our Criminal Rule 8, entitled "'Free Press-Fair Trial' Directives," provides in part as follows:

"(a) It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

"With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in the investigation shall refrain from making any extrajudicial statement, for dissemination by any means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

"From the time of arrest, issuance of an arrest warrant or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or

Footnote 2 cont'd

disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement, for dissemination by any means of public communication, relating to that matter and concerning:

"(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

"(2) The existence of contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

"(3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

"(4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;

"(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

"(6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case."

3. Department of Justice regulations published at 28 CFR §50.2 provide in seemingly pertinent part:

"(a) General. (1) The availability to news media of information in criminal and civil cases is a matter which has become increasingly a subject of concern in the administration of justice. The purpose of this statement is to formulate specific guidelines for the release of such information by personnel of the Department of Justice."

* * * * *

"(b) Guidelines to criminal actions.

"(1) These guidelines shall apply to the release of information to news media from the time a person is the subject of a criminal investigation until any proceeding resulting from such an investigation has been terminated by trial or otherwise.

"(2) At no time shall personnel of the Department of Justice furnish any statement or information for the purpose of influencing the outcome of a defendant's trial, nor shall personnel of the Department furnish any statement or information, which could reasonably be expected to be disseminated by means of public communication, if such a statement or information may reasonably be expected to influence the outcome of a pending or future trial.

"(3) Personnel of the Department of Justice, subject to specific limitations imposed by law or court rule or order, may make public the following information:

"(1) The defendant's name, age, residence, employment, marital status, and similar background information.

Footnote 3 cont'd

"(ii) The substance or text of the charge, such as a complaint, indictment, or information.

"(iii) The identity of the investigating and/or arresting agency and the length or scope of an investigation.

"(iv) The circumstances immediately surrounding an arrest, including the time and place of arrest, resistance, pursuit, possession and use of weapons, and a description of physical items seized at the time of arrest.

"Disclosures should include only incontrovertible, factual matters, and should not include subjective observations. In addition, where background information or information relating to the circumstances of an arrest or investigation would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public."

* * * * *

"(7) Personnel of the Department of Justice should take no action to encourage or assist news media in photographing or televising a defendant or accused person being held or transported in Federal custody. Departmental representatives should not make available photographs of a defendant unless a law enforcement function is served thereby."

Apart from its immateriality, the contention seems unsound. Our trial began in October, six months after the publicized arrests. To revive the publicity by a hearing about it was not clearly desirable. The court is not required in the circumstances to treat the subject as forever closed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

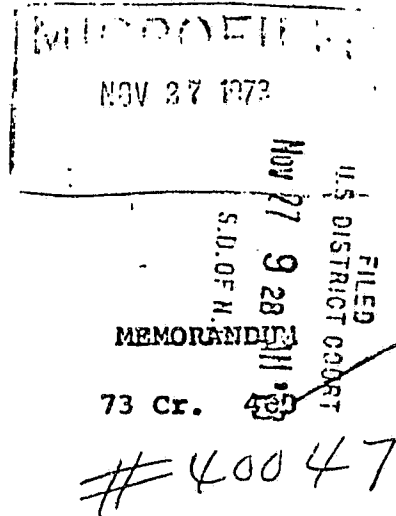
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UNITED STATES OF AMERICA,

-against-

JOHN CAPRA, et al.,

Defendants.
----- x

FRANKEL, D.J.



Among the many subjects touched in pretrial hearings and left for further consideration at a later time was the matter of pretrial arrangements for publicity attending the mass of arrests on the morning of April 13-14, 1973. There remain questions as to whether these activities should be grounds for remedial action of any kind in the exercise of the court's supervisory power over the business of law enforcement attending federal prosecutions.

Government counsel are now directed to present, in addition to other submissions contemplated for defendants' post-trial motions, the following:

(1) A listing of the media representatives (reporters, photographers, and any others) who were present at the assembly of law enforcement officers on the night of April 13, 1973, at B.N.D.D. headquarters, or at any other such meeting, where instructions for the arrests were given.

(2) A listing of such representatives, along with an indication of their respective media, who accompanied arresting officers on their arrest missions of April 13-14.

(3) A list of the names of those supervisory personnel of the law enforcement agencies who authorized the presence of these media representatives.

(4) A Statement as to whether the United States Attorney or his representatives joined in such authorizations.

(5) If the answer to "(4)" is no, a statement whether responsible members of the United States Attorney's office (a) knew of, (b) acquiesced in, or (c) opposed such participation by media representatives. If there was opposition, state who expressed it and how.

(6) A statement by the United States Attorney as to whether the participation of media representatives should be deemed to have been proper.

(7) A statement of the United States Attorney as to what remedial action, if any, he has taken or proposes to take. State, for example, whether consideration has been given to the institution of contempt or other proceedings under this Court's Criminal Rule 8.

(8) A statement of position as to what remedial action, if any, should be taken by the court.

The foregoing submissions should be served and filed by December 17, 1973.

Defense counsel are invited, of course, to present materials they deem appropriate on this subject. Without limiting the scope of such submissions, the court recalls that there were placed before us in pretrial hearings some photographs of people being arrested, including some evidently being "posed" for photographers. It may be that materials of this kind will be appropriate for this or some higher court in considering the fairness and propriety of the

proceedings leading to the convictions herein.

Defendants' submissions on this matter
should be served and filed by December 24, 1973.

Dated, New York, New York
November 27, 1973

Marvin E. Fraubel

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
UNITED STATES OF AMERICA,

-against-

JOHN CAPRA, et al.,

Defendants.
----- x

MEMORANDUM

73 Cr. 460

S.D. OF N.Y.

DEC 27 1 34 PM '73

FILED
U.S. DISTRICT COURT

FRANKEL, D.J.

The actual trial of this case (including approximately a half day for jury selection and one and a half days for the jury's deliberations) required a total of approximately 19 court days. As is not uncommon, a substantial number of other days prior to trial were required for the hearing of motions to suppress evidence. In the end, the three motions requiring those 11 further days of hearing were all denied. One such denial has been embodied in an opinion which was given to counsel but not filed until after the verdict, all being agreed that there should be all possible efforts to avoid publicity for this case. The concern about publicity, coupled with the pressures of time, led to the postponement

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of opinions explaining the rulings on the other two motions. This is the last of such delayed opinions, accounting for denial of a motion to suppress a large shipment of heroin and cocaine found in a suitcase.

On October 28, 1971, the suitcase in question was opened in a baggage room of the Central Union Railroad Terminal in Toledo, Ohio. The suitcase was found to contain some 5 1/2 kilograms of heroin and a kilogram of cocaine. The evidence thus disclosed came to be a substantial factor in a state narcotics trial in Toledo, where people there ultimately convicted sought unsuccessfully to suppress, claiming the requisite proprietary interest as grounds for their standing. Much later, as the instant case approached trial, three of the defendants herein brought on a similar motion, also claiming the necessary possessory interest.

As the motion in this case was originally presented, upon affidavits, the claim of a possessory interest by the movants - John Capra, Leoluca Guarino, and Stephen Della Cava - was in general and conclusory terms.¹ A question arose as to whether such broad conclusions, particularly in the odd circumstances of this case, should be deemed sufficient

to afford standing. The Court concluded that the concrete facts claimed to demonstrate such an interest should be the subject of evidentiary exploration and should be exposed to cross-examination, this course appearing to be comfortably open under the doctrine of Slattery v. United States, 390 U.S. 377 (1968), which bars the use of such testimony in the government's case in chief at trial. The thrust of this conclusion was a somewhat scathing performance, serving in a vivid way to ease the possible doubts of our exclusionary doctrine. The narcotics producers to describe in particular detail their engagement in a major narcotics transaction, mentioning specifically their knowledge of the huge quantity of heroin and cocaine exposed by the "Golden Search". The films explained that they were partners in a variety of enterprises, including the particular narcotics transactions. Stephen Della Cava stated that, as the partner assigned to this role, he went to a local department store and purchased the suitcase. Then, he testified, the shipment of narcotics was packed in the suitcase, which was locked. The suitcase was then to be shipped by second class mail for delivery in Toledo. 22 After the shipment was made, the understanding was that the suitcase would be delivered to the address in Toledo.

customer. The customer would thereafter pick up the suitcase, thus taking his narcotics delivery. Other evidence later showed that the transaction was completed, except that the consignees were arrested in Toledo when they arrived to claim the "property."

Messrs. Capra and Guarino testified as to their partnership interests. The totality of the testimony of the three was to the effect that they all jointly owned the suitcase,³ and thus had joint and several standing to seek suppression of its contents found in the Toledo search.

The testimony from this point proceeded to take on an ersatz flavor of the Uniform Commercial Code rather than our usual narcotics case.⁴ The movants were taken through testimony by which they undertook to show that they never relinquished their possessory interest in the suitcase when it was given to the courier, the argument being that the risk of loss remained upon them.⁵ As a further elaboration of this argument, they swore that they had not been paid in full for the narcotics, so that the ownership, as well as the risk of loss, never vested in the consignees.

The argument and the motion failed at this point. The evidence, sufficiently at the suppression hearing, and then beyond a reasonable doubt at the trial, showed that these movants, in the particular transaction and in many others, consistently demanded that the payment for their narcotics shipments be "up front" - i.e., in advance of shipment and delivery.⁶ From the evidence before this court, it appears that standing to attack the search, if it existed anywhere, resided in the consignees rather than the consignors. The movants here had been paid in full for their contraband and had no further interest of any kind either in the wrapping - the suitcase - or the contents. See United States v. Epstein, 240 F. Supp. 80, 82 (S.D.N.Y. 1965).

This conclusion seems sufficient in itself to defeat the motion.⁷

It should be noted, however, that on the further facts disclosed by our hearing, the motion to suppress would be denied in any event. The court concludes that upon the particular facts of this case, as they unfolded in Toledo, there was no such invasion of privacy through the opening of the suitcase as to require suppression of the fearsome things the suitcase contained.

The suitcase was checked at the baggage room of the Railroad Terminal at approximately 11:15 a.m. on October 20, 1971. The baggage agent on duty, Milton Julert, suggested to the depositor that the case be placed in a coin locker on the main concourse of the terminal where it would be safer. The man insisted, however, that it be kept in the baggage room. He stated that he would pick it up in a day or two.

Julert thought the circumstances suspicious. The baggage room was ordinarily used as a repository for periods of up to a few hours for luggage to be placed on or received from the two trains which daily passed through Toledo. The suitcase was the first item parcel-checked in six months. In addition, the man who left the suitcase "acted funny," was "nervous and tense," and raised his voice aggressively in rejecting the agent's suggestion. Furthermore, when removing the bag to the storage area, Julert noted it was unusually heavy and made a "rustling" sound like cellophane or plastic. For a fleeting moment, he considered that the bag might contain a bomb. Since Julert was scheduled to be off for the next two days, he reported the presence

of the suitcase to the relief baggage assistant, Charles Sibold. On Saturday, October 23, Sibold made a similar examination of the suitcase, noting its weight and the "swishing" sound it produced.

When the bag had not been claimed by Tuesday, October 26, Sibold and Julert discussed its continued presence and Sibold suggested that the Railroad police be contacted. Julert was concerned about the security of the suitcase. Sibold on the other hand was worried that it might contain explosives.

Sibold spoke the next day with Captain Albert Blevins of the Penn Central Police. Sibold related the circumstances surrounding the checking of the bag and indicated that he wished to open it. Both men then went to the baggage room where Sibold attempted unsuccessfully to open the suitcase with keys kept on hand. Blevins testified that his function was to act as a witness, pursuant to Penn Central policy, to protect the baggage agent and the company from future claims. By this time, Blevins was similarly concerned about the contents of the suitcase. He had

been present on a prior occasion when the makings of a pipe bomb were discovered in a parcel stored in the Penn Central Station in Cleveland. Blevins told Sibold that he would try to get help in opening the bag, and that afternoon he requested such assistance from his friend and "primary contact" with the Toledo Police Department, Detective George Ryan. Blevins indicated to Ryan his suspicion regarding the possible presence of explosives.

The following day, Thursday, October 28, 1971, Detective Ryan arrived at the terminal accompanied by Officer Gerry Bedal and Detective Robert Beavers. Bedal, who had experience in opening locks, had been en route to the station with Ryan when they met Beavers and invited him to join them. Both Ryan and Beavers were assigned to the Metropolitan Drug Unit of the Toledo Police Department. At the baggage room, Bedal, in the presence of Sibold, Blevins, and the two other officers, attempted unsuccessfully to turn the two locks on the suitcase with a screwdriver and a pick-like instrument. He finally opened the locks with

paper clips provided by Blevins and Sibold. Sibold then took and opened the suitcase. Inside there were a number of plastic bags containing a white powder and some towels. Officer Beavers picked up one bag with the initial "C" on it, opened and examined it, and showed it to Detective Ryan. Suspecting that the bags might contain narcotics, the officers requested a field test kit from the Metropolitan Drug Unit.

When the field test of the "C" bag produced a positive result, several officers took two of the bags to a nearby laboratory for further examination. The suitcase and contents were stored overnight in a safe at the Terminal. The next day officers removed the plastic bags to the police station, replacing them with objects of equivalent weight.

On October 31, 1971, at approximately 8:15 a.m. Willie Middlebrook, named as a co-conspirator but not a defendant, presented the claim check and obtained the suitcase. In the main concourse of the terminal, he met defendant Alan Morris. Both were arrested by the Toledo police.

Upon the foregoing facts, the court would sustain the seizure if there were occasion to reach the question. This was not an "intrusion" initiated by law enforcement officers "with the specific intent of discovering evidence of a crime * * *." Cady v. Dombrowski, 41 U.S. L.W. 4995, 4997 n.* (June 21, 1973). See also Haerr v. United States, 200 F. 2d 533, 535 (5th Cir. 1957). It was in fact a "private" search in the ample sense that it was undertaken by private persons acting upon private suspicions touching legitimate concerns of their own and their employer. But for their inability to open the suitcase by themselves without damaging it, the railroad employees would never have involved the police. Failing in their own efforts, the baggage room employee and security officer were still concerned over the suspicious circumstances attending the stored bag -- the somewhat menacing manner of the man who had left it, the long delay after the promise to return for it in a day or two, the unusual weight of the bag, and the disturbing sound of its contents.

While the railroad employees did not have or seek legal advice, their conduct was at least consonant with their employer's duties and rights - whether as a non-gratuitous bailee, see O'Brien v. Penn. R. Co., 184 F.Supp. 305, 307 (S.D.N.Y. 1960); United States Fire Ins. Co. v. Paramount Fur Service, 168 Ohio St. 431, 156 N.E.2d 121 (1959); National Liberty Ins. Co. v. Sturtevant-Jones Co., 116 Ohio St. 299, 156 N.E. 446 (1927); F.E. Avery Co. v. George, 160 N.E.2d 305 (Ohio App. 1959); cf. Boyden v. United States, 80 U.S. (13 Wall) 17, 21-22 (1877), or as a common carrier, see 47 U.S.C. §20(11); Missouri Pac. R. Co. v. Elmore & Stahl, 377 U.S. 134, rehearing denied, 377 U.S. 984 (1964); Secretary of Agriculture v. United States, 350 U.S. 162, 165 n.9 (1956); Continental Can Co. v. Eazor Express, Inc., 354 F.2d 222 (2d Cir. 1965); cf. The Nitro-glycerine Case, 82 U.S. (15 Wall.) 524 (1872); Bruskas v. Railway Express Agency, 172 F.2d 915, 918 (10th Cir. 1949), to protect its own property, the property of passengers, and the physical safety of everyone against even modest, if not chimerical, dangers of explosions or other kinds of destruction.

When the Toledo police officers arrived in this setting, the occasion for their presence was primarily service to those who had enlisted their aid rather than the pursuit or detection of criminals. Undoubtedly, they were prepared to be interested in evidence of criminal misconduct. But they were not required to have a search warrant for the precautionary assistance they came to supply. See Cady v. Dombrowski, 41 U.S.L.W. 4995, 4997 n.* (June 21, 1973); Haerr v. United States, 240 F.2d 533, 535 (5th Cir. 1957); Marshall v. United States, 422 F.2d 185, 189 (5th Cir. 1970).

In short, the court would sustain this as an essentially private search and a lawful seizure under authorities not always perfectly harmonious but sufficient in their net effect to validate what was done here. United States v. Blum, 329 F.2d 49, 52 (2d Cir.), cert. denied, 377 U.S. 993 (1964); Wolf Low v. United States, 391 F.2d 61 (9th Cir.), cert. denied, 393 U.S. 849 (1968); United States v. Averell, 296 F. Supp. 1004, 1008-12 (E.D.N.Y. 1969); see United States v. Beasley, 485 F.2d 60 (10th Cir. 1973);

United States v. Echols, 477 F.2d 37 (8th Cir. 1973),
cert. denied, 42 U.S.L.W. 3195 (October 9, 1973);
United States v. Burton, 475 F.2d 469 (8th Cir. 1973);
United States v. Cangiano, 464 F.2d 320 (2d Cir. 1972),
vacated on other grounds, 41 U.S.L.W. 3671 (June 25,
1973); United States v. Tripp, 468 F.2d 569
(9th Cir. 1972), cert. denied, 410 U.S. 910 (1973);
United States v. Gold, 378 F.2d 588, 591 (9th Cir.
1967); United States v. Pryba, 312 F.Supp. 466,
472 (D.D.C. 1970). But cf. Corngold v. United States,
367 F.2d 1 (9th Cir. 1966).

Dated: New York, New York
December 27, 1973

Maurice E. Frankel
U.S.D.J.

FOOTNOTES:

1. An affidavit of September 5, 1973, submitted by Della Cava and adopted by the other two defendants merely stated: "The bag * * * was owned by me together with the defendants CAPRA and GUARINO at the time of the aforementioned Toledo search and seizure."

2. Della Cava testified:
 "Well, I don't remember dates exactly. What I do know is that I purchased the bag that supposedly was met in Toledo. I purchased it in Korvettes and I paid 30-something dollars for it. I also put this narcotics in this bag, took this bag and delivered it to Ramos."

In response to the question whether Della Cava had discussed with Capra and Guarino the contents of the bag prior to loading it, he stated: "Yes, sir, we talked about the purchase of it, what went in it, what was going to go into it and who was going to get it."

3. The money used to purchase the bag was from what Della Cava termed a "kitty," contributed to by the three movants. Guarino elaborated on this in his testimony:

"If we had to make any expenditures in conjunction with any of our businesses, he would relate it back to us and we would reimburse him. That's the extent of the kitty we had."

4. Illustration from Della Cava's testimony:

"Q. Now, did you have any discussion with Mr. Ramos regarding what would happen, if anything, should the drugs be lost in transit, whose risk or on which party the risk of loss would fall?"

Footnote 4 cont'd

"Q Who would be responsible.

"A I would be responsible."

See also these compliant responses by defendant Guarino;

"Q I want to ask you -- Strike that.

"With respect to what you felt in your mind back in October of 1971, who was responsible for those drugs until the entire amount of money, as agreed upon, was paid?

"A The four partners.

"Q And if anything happened to those drugs, I don't care whether they were seized or whether they were destroyed, who would stand the loss with respect to that?

"A The four partners.

"Q That was your agreement?

"A Yes.

"Q And that was your state of mind?

"A Correct.

"Q Were you at any time, either you or your partners, paid in full as per the agreement you all had together?

"A No.

"Q Is it your testimony that you did not know to whom Mr. Ramos had agreed to ultimately dispose of the drugs with[sic]?

Footnote 4 cont'd

"A Correct.

"Q That was his business?

"A I never inquired.

"Q Your part of the partnership was to produce the drugs, give them to Ramos for the ultimate final sale?

"A Correct.

"Q And that sale was never materialized, was it?

"A Correct.

"Q There was still a balance due and owing the last time you saw those drugs?

"A Correct.

Similarly, defendant Capra testified:

"Q Was there a sale consummated prior to their receipt by the buyer?

"A All they wanted was a partial payment down.

"Q Would you tell me the arrangements?

"A All right. I'll tell you the whole arrangements. The arrangements was we would not give anything up unless we got any money first, partial anyway.

"Q That's known as front money; is that correct?

"A That's correct. When we got the money, then we proceeded to give the money, take the narcotics with the assumption that if it is not what it's supposed to be or short or bad, or whatever, the money would come back to those people that put up the money for the narcotics. And we would get the narcotics back and we would turn it back.

Footnote 4 cont'd

"Q What was your understanding if the narcotics were seized prior to the people receiving it in Toledo, Ohio?

"A That's my responsibility because somebody, they can't pay for what they don't get.

"Q Therefore, in your own mind and in actuality, you never relinquished possession of the narcotics and the suitcase; is that correct?

"A Never."

5. Deila Cava testified that he and his partners "would get the money or the suitcase back" depending on whether or not the customers were satisfied with the shipment. Capra stated that "definitely" the partners would have to pay for the narcotics if they were seized. And, if the narcotics were short "it would be up to the people that were getting the delivery to do what they wanted with it, as far as maybe balancing it out with money or return it or just ask for the rest of the delivery."
6. Although the three movants testified at the hearing that they had only received a down payment for the narcotics shipment, their own figures belied this assertion. Any amounts still owing were for their codefendant Jermain and Joaquin Ramos, a co-conspirator who testified for the prosecution.
7. This result does not create any problem of inconsistency in the Government's positions of the kind considered in Jones v. United States, 362 U.S. 257, 263 (1960), quite apart from the somewhat open question as to how far such inconsistencies may matter under the law as it exists today. Brown v. United States, 411 U.S. 223, 228-29 (1973).

The motion to suppress was made, quite properly, in terms of Counts 4 and 5 of the indictment, which

related to the transaction ending in the Toledo seizure. It was entirely consistent with the Government's position before trial, still more clearly at the trial, to show that the movants had possessed the narcotics, as the indictment alleged, "in the Southern District of New York," and that this possession ended when the suitcase was given in this District to a courier, well before the later search and seizure in Toledo.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
UNITED STATES OF AMERICA :

-against- :

JOHN CAPRA, et al., :

Defendants. :

----- -x
FRANKEL, D.J.

73 Cr. 460

MEMORANDUM

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FILED
U.S. DISTRICT COURT
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S.D.N.Y.

Lengthiest among the extended pretrial hearings in this case was that generated by the contention that there had been a violation of 18 U.S.C. §2518(5) and N.Y. Crim. Pro. Law §700.30(7) because telephone interceptions pursuant to state authorizations had not been sufficiently "minimized." The issue was narrowed to require that we consider only the course of overhearing on one public telephone, at Diane's Bar. Even this turned out to require evidentiary hearings extending over some seven days. As a result of those hearings, and upon the study of detailed submissions on the law, the court denied the motions to suppress, but postponed until after trial the filing of an opinion explaining the decision. This memorandum gives the explanation.¹

The eavesdropping warrant for the Diane's

Bar tap was issued by New York Supreme Court Justice Harold Birns on December 8, 1971, and authorized the interception of the "telephonic conversations of JOSEPH DELLA VALLE * * * pertaining to the purchase, sale, transfer, shipment or possession of narcotic drugs * * *." On January 6, 1972, Justice Birns extended the order for an additional 30 days and amended the warrant to authorize the interception of:

"telephonic conversations of JOSEPH DELLA VALLE and also telephonic conversations of STEVEN DELLA CAVA, with each other and with their co-conspirators, accomplices, and agents, * * * pertaining to the purchase, sale, transfer, shipment or possession of narcotic drugs * * *."

Pursuant to these authorizations electronic surveillance was maintained from December 9, 1971 to February 4, 1972. The court has studied in detail the directions given to the monitoring officers, their functioning under these instructions, and the several grounds upon which the adequacy of the minimization is assailed, especially the central contention that defendant Della Cava was unlawfully overheard for an extended period before interception of his conversations had been authorized. As has been stated, the result of these studies has been a determination that the suppression motion could not prevail.

The evidence on this subject disclosed that those in charge of the eavesdropping enterprise were carefully attentive to, and concerned about, the minimization requirement. The office of District Attorney Hogan had a policy requiring not only that the police check with one of his assistant district attorneys, but further that the assistant check the planned operation in turn with an appellate member of the staff who had studied the federal statute and the materials relating to it. Careful instructions were given to the police officers requiring that they avoid intrusions upon privileged conversations and that they turn off conversations outside the scope of their authority to listen. The legal officers emphasized in their instructions the need for special care because of the fact that the tap was to be on a public telephone. The police were cautioned not to let the machine record while they were not monitoring, and this instruction appears to have been followed with detailed care.

In addition to these instructions, Assistant District Attorney Fishman was to be kept abreast of developments during the wiretap. He

talked with the monitoring officers several times a week and was furnished with logs and transcribed conversations.

The monitoring officers followed a prescribed routine. They signed in at the post and activated the recording machine when they went on a tour of duty. The machine was operative only while officers were present at the post. Although normally two officers were on duty, personnel requirements elsewhere were such that it was not possible at times to have more than one officer present. The hours of monitoring fluctuated depending on the availability of personnel and other investigative requirements; for example, the officers would shut down the operation when the subject left the bar and continue their investigation by visual surveillance. The machine (audio and record) was designed so that it was activated when a number was dialed or an incoming call received. A pen register identified numbers dialed. The officers logged almost all of the calls intercepted, noting the time, participants if identifiable, and the pertinency of the call (as it was estimated at the time). Ordinarily the two officers would listen together, with one taking notes, and then

they would discuss the content of the call. Detective Eaton reviewed the tapes and then sent them "as soon as practical" to A.D.A. Fishman.

To appraise the adequacy of the minimization in light of the several precedents already available,³ the court invited statistical analyses from the parties. Defendants claimed initially that all calls had been intercepted in full - that the officers had failed always to disconnect nonpertinent calls. This and other contentions proved, however, to be mistaken when the materials came to be examined in detail. It was shown that a total of approximately 1561 calls were intercepted (i.e., monitored and/or recorded) under the two Diane's Bar orders. Of these, 402 calls were "incomplete" in that they were to wrong numbers, calls for information, busy signals, and the like. Of the 1159 completed calls, 751 were intercepted in full. 620 of these 751 were less than two minutes long, so that they may for our purposes be excluded from consideration. See Bynum, supra, slip op. at 5310.

As to the defendant Della Cava, whose intercepted conversations were at the center of the inquiry, there were 235 fully intercepted

calls⁴ Of these, 200 lasted less than two minutes.

In the belief that hearings of this nature should be, if not entirely minimized, brought within limits consistent with the existence of other court business, we called upon the parties to prepare samples of the interceptions that could occupy a day or so of court listening and serve arguably to support the respective contentions. Defendants presented 86 calls for this purpose, and another 40 were added later to a compilation built upon agreed criteria. Of the total of 126, 76 were under two minutes in length.⁵

As to the remaining 50 conversations, it is evident with complete hindsight that a substantial number were properly to be deemed "pertinent" to the investigation. The exact number we would give today is scarcely decisive, however; for it is clear that the number would be too small to reflect fairly the efforts of the officers on the spot to "minimize" in light of the limited knowledge available to them. As would be expectable in any such situation, the calls of over two minutes in duration were characterized by changing participants, cryptic references, garbled and noisy reception, long delays while different parties were

and other difficulties *rendering it unacceptable to*
 insist that the police officers should *have ignored or*
 disconnected many of these calls sooner.

The papers emphasize that sounds that seem innocuous or unintelligible to the law-abiding soon came to be recognized as code words for illicit conduct. Looking back over the eavesdropping record, we are advised and guided as to the words of this nature. For those involved in the police effort at the time, the task was less simple. There was no glossary to tell in advance that the references to "chess" and to "a little friend" very likely had to do with narcotics transactions. There was no clue to tell right off that a person announcing he was "sick" meant he was unable to deliver narcotics. Similar cases of Aesopian jargon had to be identified and made intelligible as the work progressed.

"Pertinency" is a concept of shifting and elusive dimensions. One conversation may be pertinent because it refers to an alleged exchange of narcotics, while another may be pertinent merely because it indicates the whereabouts and future movements of

the subject. It is under the latter definition that the interception of calls between Della Cava and a woman named Jean would appear to have been justified. The defense has argued that such conversations were "personal" and should not have been monitored. The court during its listening session heard eight of these exchanges, of which five were over two minutes in duration. Portions of these conversations undoubtedly were intimate, including a quarrel which was monitored for nearly eight minutes. Yet others sounded suspicious and might have indicated to the officers that Jean was at the least cognizant of Della Cava's activities. Some contained references to where Della Cava was going and what he was doing. In the final conversation played for the court as part of the defense presentation, Della Cava indicated to Jean that he was going to stay at the bar for a while and then go "uptown" -- a reference to a social club frequented by other defendants and used to transact their illicit business.

Voice identification proved to be a substantial problem during the wiretap. The male voices most frequently heard from Diane's Bar were fairly deep and characterized

by inflections that may permissibly be called Italo-American. With hindsight and with the kind of repeated reasoning in which counsel engage during the work of a lawsuit - even in these laboratory conditions we have all perceived how easy it is to err. Thus, one of the conversations recorded and monitored in full, on December 13, 1971, was logged as that of "Beansie" with "wife." Listening to it after having acquired a substantial amount of expertise, the court noted it as involving "Beansie." It required the guidance of more expert counsel and a rehearing of the conversation by the court to become aware that Beansie was not actually a participant in this conversation.

This episode - and the more general subject of voice identification to which it relates - touches a central target of the defense attack, the delay in obtaining an amended order for the overhearing of Della Cava on the Diane's Bar telephone. During the initial ten days of/wiretap, the monitoring officers intercepted the conversations of a "Beans," "Beansie" or "Stevie" (now known to us as the defendant Della Cava) in the belief that he was the authorized

subject, Joseph Della Valle. On or about December 11 or 12, certain developments raised a question whether "Beansie" was in fact Della Valle. While listening to the conversations thought to be those of Della Valle, Detective Eaton, the officer primarily in charge, began to detect a difference in the voices of "Beansie" and Della Valle. In addition, if "Beansie" was Della Valle, then the subject would have had five or six nicknames, a situation at least unlikely. It was not, however, until December 19, during the course of an intercepted conversation, that these doubts were resolved. The delay in reaching this point, in light of all the circumstances, is both understandable and excusable. There never was, nor do defendants suggest, any reason whatever for the monitoring officers to pretend that Della Cava had not been distinguished as a separate voice when he actually had been.

We were made to realize in the course of our hearing that the monitoring officers worked in changing shifts and under quite different circumstances, with long pauses between calls, and frequently a different order of calls than that given to us in the selected group. Thus, it was pointed out on at least a couple of occasions

that a relatively long call, seemingly innocuous or nonpertinent, which was not disconnected as our retrospective judgment would dictate, followed in fact a very sensitive and seemingly significant call which could have been deemed to have alerted and sensitized the officers to the prospect of more materials to come. The process of listening to the calls while consulting the logs demonstrated that some officers came to know one or another voice while others were ignorant of it. Thus, where an ignorant officer failed to disconnect a call, it is explained with some frequency on the ground that he was not aware of the nonpertinent character of the speaker.

The defendants have argued that the detective work done before and during the eavesdropping was insufficiently expert. It is said Detective Eaton should have gone with his informant to a better place in order to make telephone calls through which he undertook to learn and to be able to identify the voice of Della Valle. Similarly, it is said that Eaton was careless in failing to pick up references in conversations which would have excluded Della Valle as the subject. In one, reference was made to a

wife, yet it was known or should have been known that Della Valle was unmarried. In another, the male participant indicated he was "tending bar" at Diane's - again eliminating Della Valle since it was known that he was not employed as a bartender. Regarding the uncertainty that developed on December 12 about whether "Beansie" and Della Valle were the same person, the defense argues that the officers failed to take steps to resolve the misidentification. In particular, they failed to check the New York Police Department alias file to determine whether Della Valle had ever used the nickname "Beansie." Furthermore, a comparison of the monitoring logs from the Diane's Bar and Thieriot Avenue (Della Valle's residence) wiretaps would have revealed that "Blackie" (Della Valle) was at Thieriot Avenue at the same time "Beansie" (Della Cava) was at Diane's Bar. Contentions of a like nature are made with respect to other details.

The court has considered all such matters and is led to realize that the surveillance was not as meticulous and limited as more nearly perfect detective work would have made it. But none of the imperfections indicates more than human fallibility within tolerable limits.

To be sure, better detective work would presumably have forestalled points pressed by defendants. But this is not because any of the omissions pinpointed now was generated by any disposition to ignore or violate the rights of privacy with which both the statutes and the Fourth Amendment are concerned.

A more serious argument - the most serious of those defendants present - is rested on the facts that (1) Della Cava was overheard under the December 8th order providing for interception of only Della Valle conversations, (2) the separate identity of Della Cava became known at least by December 19, but (3) the new order embracing Della Cava was not obtained until January 6, 1972. In the actual circumstances disclosed by the record, however, it seems clear that all reasonable efforts were made to comply with legal requirements that were neither simple for the police and prosecution officers attempting to proceed lawfully nor necessarily pellucid to this court as the problem has come on for decision in relative tranquillity.

Detective Eaton reported to his police superior and to A.D.A. Fishman on December 20 the apparent identification of a separate voice which was to be

attached three days or so later to Della Cava.

Fishman concluded that the officers should seek to pinpoint the identity of this "Beansie" as precisely as possible before an amended order was sought.

This seems in retrospect to have been an error.

It would have been possible promptly upon

ascertaining the separate identity of "Beansie"

(and, simultaneously, the evidence that he was engaged in narcotics transactions) to have gotten an amended order covering him even though his correct name was not yet known.⁶ It is not possible to doubt in the circum-

stances that an application for such an order would have been granted or that the affected officers would have known this at the time.

The question is, then, whether the delay in applying, given the explanation for the delay, should render the police conduct so unreasonable as to require suppression of the evidence thus procured. And this, the court believes, should be answered by viewing the problem from the vantage point of the law enforcement people on the scene, not only, or mainly, as a question of law to be answered "correctly" in the comfort of our library so long afterwards. It is in this light, on grounds

largely stated already, that the thesis of defendants has been rejected.

Both the Congress and the New York Legislature, in their comparable enactments defining the scope of permissible wiretapping, recognized the likelihood that a wiretap would disclose "other crimes" than those within the authorization. To avoid the absurdity of forbidding the use of such information overheard in a lawful interception, both legislatures allowed disclosures to other law enforcement people. See 18 U.S.C. §2517(1), (2) and (5); N.Y. Crim. Pro. Law §700.65(1), (2) and (4). In addition, the federal statute provides that the contents of any such communication, or evidence derived therefrom, may be introduced in evidence in a criminal proceeding

"when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of [the statute]."
18 U.S.C. §2517(5).

Such an application must be made "as soon as practicable."

The Senate Report accompanying the statute reflects the predictable understanding that the subsequent application would include "a showing that the original order was

lawfully obtained, that it was sought in good faith and not as subterfuge search, and that the communication was in fact incidentally intercepted during the course of a lawfully executed order." S.Rep. No.

1097, 90th Cong., 2d Sess. 12 (1968), as quoted in U.S. Code, Cong. & Admin. News, 1968, p. 2189.

Similarly, the New York statute allows the use of such interceptions as evidence

"when a justice amends the eavesdropping warrant to include such contents. The application for such amendment must be made by the applicant as soon as practicable. If the justice finds that such contents were otherwise intercepted in accordance with the provisions of this article, he may grant the application." N.Y. Crim. Pro. Law, §700.65(4).

Although these two provisions deal specifically with the procedure to be followed when information relating to offenses other than those in the warrant is intercepted, their requirements should apply by close analogy to the converse situation - where the investigation of the "crime" is expressly authorized but the parties are other than those named in the warrant. The purpose of both §700.65(4) and §2517(5) is to allow the use of incriminating evidence which has been incidentally intercepted.

In fact, even an excessive addiction to the dictionary is satisfied by such a reading; Crime A by X is not the same "crime" as a similar offense by B. As stated in United States v. Cox, 449 F.2d 679, 687 (10th Cir. 1971), which upheld the constitutionality of §2517(5):

"It would be the height of unreasonable-ness to distinguish between the information specifically authorized and that which is unanticipated and which develops in the course of an authorized search * * *. It would be irrational to hold that officers authorized to listen to conversations about drug traffic, upon learning that a bank robbery is to occur, must at once close down the project and not use the information to prevent the robbery since the information is tainted. It would be demoralizing to allow the bank to be robbed while the investigators stood by helpless to prevent the occurrence. Harder cases can be imagined."

It would similarly be the "height of unreasonableness" to prohibit use of the information that another person is involved in the crime under investigation if the statutory requirements are followed.

Examining the conduct of the legal and police officials following December 19, the court concludes that it was reasonable and outlawry is not warranted. Although the amended order would and could have been obtained earlier, the delay of some 17 days,

when that delay embraced Christmas and New Year holidays among other obstacles to speedy action, does not serve to make lawless and unavailable the evidence of wrongdoing which was being sought with generally commendable attention to the constitutional and statutory proprieties.

Defendants complain also of undue delay in complying with statutory sealing and notice requirements. The answers are, first, that the delays were authorized by the State Justice who allowed the interceptions, second, that there has never been any remote suggestion of prejudice to any defendant from these asserted improprieties.

The sealing requirement serves, of course, "to safeguard the identity, physical integrity, and the contents of the recordings to assure their admissibility in evidence." S.Rep. No. 1097, 90th Cong., 2d Sess. (1968) as quoted in U.S.Code, Cong. & Admin. News, 1968 p. 2193. There has been no doubt in this case that Justice Birns was justified in relying upon the custodial facilities of District Attorney Hogan. More importantly, no defendant has questioned at any time the

accuracy or integrity of the recordings. It would enshrine a technicality to proscribe the tapes in this setting. In any event, the entire omission of a seal need not be fatal. Delay in sealing is surely no more serious. United States v. Poeta, 455 F.2d 117, 122 (2d Cir.), cert. denied, 406 U.S. 948 (1972).

The delay in serving an inventory is less troublesome still. Such delays are countenanced for such obvious reasons as the one plainly applicable here - that a continuing investigation might be thwarted or impaired by premature disclosure of its existence. See 18 U.S.C. §2518(8)(d); N.Y. Crim. Pro. Law §§700.50(4), 700.05(7); S. Rep. No. 1097, in U.S. Code, Cong. & Admin. News, supra, at 2194.

To repeat and summarize, the foregoing records the reasons why the motion to suppress evidence from the Diane's Bar interceptions was denied.

Dated: New York, New York
December 4, 1973

Maurin E. Frankel
U.S.D.J.

FOOTNOTES:

1. Some defendants urged that an array of other state taps, from which no evidence was to be (or, in the event, was) offered had to be studied for minimization to determine whether there might be tainted evidence at the trial. The court ruled that this subject, if it was ever to be considered, would be for post-trial study, when the evidence to be examined for taint would be concretely and fully known. Whether any defendant can or will make a showing warranting such post-trial consideration remains to be seen.
2. The indictment in this case names one Stephen "Dellacava." The defendant on an affidavit submitted to the court signed his name as Stephen Della Cava. The court will use the latter form.
3. United States v. Bynum, Docket No. 72-1857 (2d Cir. Sept. 24, 1973), came down toward the close of the evidentiary hearings herein.
4. The defense gave this figure as 223.
5. Of the 76, 14 lasted less than 30 seconds, 30 lasted between 30 to 60 seconds, and 20 were from 60 to 90 seconds.
6. An application for an eavesdropping warrant as well as the warrant itself must contain, inter alia, "the identity of the person, if known, * * * whose communications are to be intercepted." N.Y. Crim. Pro. Law §700.20(2)(b)(iv); 700.30(2). People v. Sher, 68 Misc. 2d 917, 329 N.Y.S. 2d 2, 8 (Greene Co. Ct. 1972). See also, 18 U.S.C. §§2518(1)(b)(iv); 2518(4)(a).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA :

-against- :

JOHN CAPRA, et al., :

Defendants. :

73 Cr. 460

MEMORANDUM
FOR
COUNSEL

----- X

FRANKEL, D.J.

The court has pending three motions to suppress - (1) evidence found in a suitcase in Toledo, (2) evidence taken from defendant Della Cava's automobile, and (3) wiretap evidence under two New York State court orders. These several motions have been studied. For the guidance of counsel and the parties, it is reported that all three will be denied. A memorandum relating to the automobile search will be filed in the next day or so. Memoranda relating to the other two motions will not be filed until after the trial has been concluded, and will be filed then only if the

circumstances make the record of the court's
findings and conclusions necessary.

Dated: New York, New York
October 15, 1973

MARVIN E. FRANKEL

U.S.D.J.

12-8-71

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----x

In the Matter

of

:
EAVES-
DROPPING
: WARRANT

the interception of telephonic communications
of JOSEPH DELLA VALLE with co-conspirators,
accomplices, and agents over telephones bearing
the numbers 722 9595 and 824 6406, subscribed
to by a "bar and grill" located at 2034 Second
Avenue, New York, and "M. Della Valle," apartment
1/0, 1475 Thieriot Avenue, Bronx, New York,
respectively.

-----x

It appearing from the affidavit of Frank S. Hogan,
District Attorney of the County of New York, and the accom-
panying affidavits of Detective George Eaton and Lieutenant-
Detective John J. Hill of the Special Investigation Unit,
Narcotics Division, and Detective William McCrorie, of the
Seventy-ninth Detective Squad, New York City Police Depart-
ment, said affidavits having been submitted in support of
this eavesdropping warrant and incorporated herein as a part
hereof, that there is probable cause to believe that evidence
of the crimes of criminal possession of a dangerous drug as
a felony and criminal sale of a dangerous drug as a felony,
in violation of article 220 of the Penal Law of the State of
New York, may be obtained by intercepting the telephonic
communications transmitted over the telephone lines and
instruments assigned numbers 722 9595 and 824 6406 described
above, and the Court being satisfied that comparable evidence
essential for the prosecution of said crimes could not be
obtained by other means, it is

ORDERED, that the District Attorney of the County
of New York, or any police officer acting under his direc-

tion is hereby authorized and empowered to intercept and record telephonic conversations of JOSEPH DELLA VALLE over the above described telephones pertaining to the purchase, sale, transfer, shipment or possession of narcotic drugs relating to the above mentioned crimes; and it is further

ORDERED, that the agents and employees of the New York Telephone Company are directly constrained not to divulge the contents of this order nor the existence of electronic eavesdropping over the above-captioned telephone lines and instruments to any person, including but not limited to the subscribers of the above-captioned telephone instruments, whether or not the said subscribers request that the said telephone instruments be checked for the existence of said electronic eavesdropping equipment, and it is further

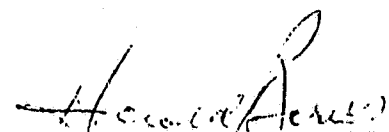
ORDERED, that this order shall be conducted in such a way as to minimize the interception of communications not related to the aforementioned crimes and that nothing herein contained shall be construed as authorizing the District Attorney or his agents to intercept or overhear any communications of JOSEPH DELLA VALLE which is otherwise privileged; and it is further

ORDERED, that this order shall be executed as soon as practicable and shall be effective from the 8th day of December, 1971, and shall continue until evidence as described in the aforementioned affidavits shall have been obtained, and said authorization shall not automatically terminate when the communications described herein have

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first been obtained, but in no event to exceed thirty (30) days from said effective date, i.e., January 6, 1971.

Dated: New York, December 8, 1971


Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----x
In the Matter

of

AFFIDAVIT

the interception of telephonic communications
of JOSEPH DELLA VALLE with co-conspirators,
accomplices, and agents over the telephones bearing
the numbers 722-9595 and 824 6406, subscribed
to by a "bar and grill" located at 2034 Second
Avenue, New York, New York, and "M. Della Valle,"
apartment 1/0, 1475 Thieriot Avenue, Bronx, New
York, respectively.
-----x

STATE OF NEW YORK)

 ss.:
COUNTY OF NEW YORK)

FRANK S. HOGAN, being duly sworn, deposes and says:

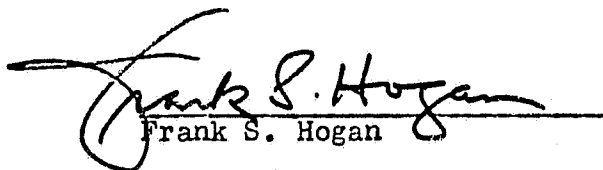
1. I am the District Attorney of the County of New York, and as such make this affidavit in support of an application for an order authorizing the interception of telephonic communications.
2. I have read the affidavit of Detective George Eaton, Shield no. , assigned to the Special Investigation Unit, Narcotics Division, New York City Police Department. I have also read the corroborating affidavit of Detective-Lieutenant John J. Hill, of the Special Investigation Unit, Narcotics Division, New York City Police Department. I have also read the corroborating affidavit of Detective William McCrorie, Shield No. 566, assigned to the Seventy-Ninth Detective Squad, New York City Police Department.
3. Based upon the facts set forth in those affidavits, I respectfully submit to the Court that there is probable cause to believe that essential evidence of the crimes referred to therein may be obtained by the interception of telephone communications over the above described telephones.

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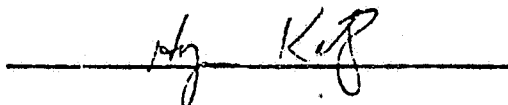
4. In my opinion there are no alternative investigative procedures that could be used to acquire the essential evidence necessary to prosecute successfully the violators of the crimes described therein. I believe that the nature and scope of the criminal activities involved is of sufficient importance to warrant the employment of electronic interception devices.

WHEREFORE, it is respectfully requested that the annexed eavesdropping warrant be issued and made effective from the effective date, December 8, 1971, until and including the 6th day of January, 1972.

No previous application for the relief sought herein has been made to any other court or justice.


Frank S. Hogan

Sworn to before me this
8th day of December, 1971



HYMAN KATZ
Notary Public, State of New York
No. 03-2644329
Qualified in Bronx County
Certificate Filed in N. Y. County
Term Expires March 30, 1973

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

In the Matter

of

:
AFFIDAVIT

the interception of telephonic communications
of JOSEPH DELLA VALLE with co-conspirators,
accomplices and agents over telephones bearing
the numbers 722-9595 and 824 6406, subscribed
to by a "bar and grill" located at 2034 Second
Avenue, New York, New York, and "M. Della Valle,"
apartment 1/0, 1475 Thieriot Avenue, Bronx, New
York, respectively.

-----X

STATE OF NEW YORK)

ss.:

COUNTY OF NEW YORK)

GEORGE EATON, being duly sworn, deposes and says:

1. I am a detective in the New York City Police
Department, assigned to the Special Investigating Unit of
the Narcotics Division, and I am presently conducting an
investigation to determine whether certain crimes of
criminally selling a dangerous drug as a felony and
criminally possessing a dangerous drug as a felony, both
of which are crimes punishable by imprisonment for more
than one year, have been and are being committed in the
County of New York.

2. This affidavit is submitted in support of
District Attorney Frank S. Hogan's application for an
eavesdropping warrant.

3. During the course of this investigation,

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I have personally received information from a confidential informant, personally known to me. His name has been withheld from this affidavit in order to protect his identity and to ensure his personal safety, but his identity has been divulged to the Justice to whom this application is being made. This confidential informant first began to provide me with information after I arrested him in April of 1971 and charged him with criminal possession of heroin of an amount in excess of one ounce. Since then he has given me information, and has cooperated and participated directly and personally in investigatory work at considerable risk to his own life, which information and participation have resulted in the arrest of five individuals for possession and/or sale of substantial quantities of heroin, and the conviction of a major narcotics violator for possession of a loaded weapon as a felony. The names of these individuals and the circumstances of my informant's cooperation and participation have been withheld from this affidavit to protect the informant's identity and to ensure his personal safety, but these names and circumstances have been made known to the Justice to whom this application is being made.

4. I am informed by this confidential informant that the informant personally knows JOSEPH DELLA VALLE, male, white, approximately 23 years old, approximately

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5' 10" approximately 190 lbs. with straight black hair, who resides at 1475 Thieriot Avenue, Apartment 1/0, Bronx, New York.

5. I am further informed by this confidential informant that in or about the early part of April, 1971, my informant went to a Bar and Grill at 2034 Second Avenue, New York, New York, in the company of another individual (since arrested within New York State and charged with conspiring to sell narcotics as a felony), and that this other individual introduced my informant to JOSEPH DELLA VALLE and his brother John Della Valle as potential sellers of heroin if my informant's other sources of heroin were unable to supply it. The name of this other individual has been withheld from this affidavit in order to protect the identity of my confidential informant, and to ensure my informant's safety, but his name has been made known to the Justice to whom this application is being made.

I am further informed by this confidential informant that after this other individual introduced my informant to JOSEPH DELLA VALLE and John Della Valle, a conversation between JOSEPH DELLA VALLE, John Della Valle; my confidential informant, and this other individual ensued.

6. I am further informed by this confidential informant that during this conversation, John Della Valle and JOSEPH DELLA VALLE confirmed to my confidential informant that, as this other individual had said to my informant in their presence, John and JOSEPH DELLA VALLE would be willing to sell heroin to my confidential informant. I am further informed by this confidential informant that during this conversation, John Della Valle, in the presence of JOSEPH DELLA VALLE, gave my informant two telephone numbers at which John or JOSEPH DELLA VALLE could be reached to make transactions dealing with narcotics.

7. I am further informed by this confidential informant that John Della Valle, in the presence of JOSEPH DELLA VALLE, told my informant that John or JOSEPH DELLA VALLE could be reached to discuss transactions in narcotics at the bar (2034 2nd Avenue) at telephone number 722 9595.

8. I am further informed by this confidential informant that John Della Valle, in the presence of JOSEPH DELLA VALLE, also told my confidential informant that John or JOSEPH DELLA VALLE could also be reached to discuss transactions in narcotics at their home at telephone number 824 6406.

apartment 1/0, 1475 Thieriot Avenue, Bronx, New York.

13. I am informed by Mr. Joseph Pizzano, New York State Department of Parole, Bronx County, that when John Della Valle was remanded for violation of parole on October 6, 1971, he gave his address as 1475 Thieriot Avenue, Bronx, New York, and stated that he lived there with his mother, Mrs. M. Della Valle, and his brother JOSEPH DELLA VALLE.

14. On Friday, October 29, 1971, at 8:15 p.m., I was present at 50th Street and Lexington Avenue with my confidential informant and I observed my informant dial telephone number 722 9595 and the informant had a conversation with JOSEPH DELLA VALLE which I overheard. This conversation, went as follows:

Male (in bar): Hello, Mondo's

Informant: Hello, is Buster there?

Male: John?

Informant: Yes.

Male: No, but his brother JOE is here.

Informant: Okay, then let me talk to him.

Male: Hold on.

JOSEPH DELLA VALLE: Yeah, who's this?

Informant: Peter, ^{*}you know, Eddie's friend ^{**}
from Long Island.

JOSEPH DELLA VALLE: Yeah?

Informant: I was looking for John.

JOSEPH DELLA VALLE: He ain't around, what do you want?

Informant: Can we talk?

JOSEPH DELLA VALLE: Yeah - but use houses.

Informant: Okay - how much with four rooms?

JOSEPH DELLA VALLE: 18.

Informant: Should I come down to the Bar?

JOSEPH DELLA VALLE: Not yet, first call me at home Monday or Tuesday about 8 o'clock - do you have the number?

Informant: Yeah, it's good, right.

JOSEPH DELLA VALLE: Don't worry, call me.

Informant: Okay, so long.

6/17
JSC

At the end of this conversation I was informed by my confidential informant that the reference to Eddie** was in fact a reference to the "other individual" discussed in paragraph 5, above, whose name has been made known to the Justice to whom this application is being made, and I was further informed by my confidential informant that the second male to whom he spoke was in fact JOSEPH DELLA VALLE.

(* "Peter" is not the name which my confidential informant gave to JOSEPH DELLA VALLE during this conversation; the name my informant actually gave to JOSEPH DELLA VALLE has been withheld to protect my informant's identity and to ensure his personal safety.)

(** "Eddie" is not the name of the "other individual"

discussed in paragraph 5, above, who introduced my confidential informant to John and JOSEPH DELLA VALLE; the true name of this individual has been withheld to protect my informant's identity and to ensure his personal safety.)

15. On Tuesday, November 2nd, 1971, at 8:10 p.m., I was present at 50th Street and Lexington Avenue with my confidential informant and I observed my confidential informant dial telephone number 824 6406, and my confidential informant had a conversation with JOSEPH DELLA VALLE which I overheard. This conversation went as follows:

JOSEPH DELLA VALLE: Hello.

Informant: Hello, Joe? Peter.*

JOSEPH DELLA VALLE: Yeah, how are you?

Informant: Okay, how's things.

JOSEPH DELLA VALLE: Looks good.

Informant: Can you deliver the house for 18?

JOSEPH DELLA VALLE: Yeah, when?

Informant: Soon, I'm waiting for the bread from a guy I know.

JOSEPH DELLA VALLE: Oh?

Informant: No problem; you can hit it four times, right?

JOSEPH DELLA VALLE: Yeah, yeah. All right, call me here or at the bar when you're ready, okay, around 8 o'clock.

Informant: Okay, so long.

JOSEPH DELLA VALLE: Alright, bye.

(* "Peter" is not the name which my confidential informant gave to JOSEPH DELLA VALLE during this conversation; the name my informant actually gave to JOSEPH DELLA VALLE has been withheld to protect my informant's identity and to ensure his personal safety.) From overhearing the conversation on October 29, 1971 and the conversation on November 2, 1971 I was able to hear that the individual to whom my informant spoke on November 2nd, 1971 was the same individual as the second male to whom my informant spoke on October 29, 1971. At the end of this conversation I was informed by my confidential informant that the person with whom I heard him speaking was in fact JOSEPH DELLA VALLE.

16. I have been a member of the New York City Police Department for eight and one half years. I have been a detective for one and one half years. I have been assigned to the Narcotics Division for two and one half years. I have been assigned to the Special Investigations Unit of the Narcotics Division for four months. During the two and a half years I have been assigned to the Narcotics Division, I have participated in excess of one hundred narcotics arrests. It is my opinion that, in the context of the above conversations, "houses" refers to kilograms of

heroin, and that when JOSEPH DELLA VALLE told my confidential informant, "OK, but use houses," JOSEPH DELLA VALLE was telling the informant to refer to kilograms of heroin in terms of "houses." Further, it is my opinion that the use of the expression "four rooms" refers to a kilogram of heroin which is pure enough that it can be diluted at least four times before resale; further, that "18" refers to \$18,000; further, that "bread" refers to money; further, that "you can hit it four times" refers to heroin which is pure enough that it can be diluted at least four times before resale. Further, I am informed by my confidential informant that my opinions stated above are accurate, and that the conversations both concerned the buying and selling of large quantities of heroin.

17. I am informed by Detective William McCrorie, No. 566, then assigned to the Special Investigations Unit of the Narcotics Division, now assigned to the 79th Detective Squad, that on October 4, 1971, at approximately 9:45 p.m. he observed JOSEPH DELLA VALLE and one Raymond Rescildo, B #692894, meet a group of persons at Second Avenue between East 114th and East 115th Streets in a public area, with trees, of the housing project located there, apparently as if by pre-arrangement. Detective McCrorie informs me that this meeting lasted approximately fifteen minutes, at which point all the individuals involved got into various automobiles and left simultaneously; JOSEPH DELLA VALLE was

seen to leave in a 1968 white body-black vinyl topped Oldsmobile Toronado, license No. XU 9158 registered to his brother, John Della Valle, 1475 Thieriot Avenue, Bronx, New York. One of the participants in this meeting was on October 20, 1971 identified by Detective McCrorie and myself to be one Alfonsno Lanza, also known as "Allie Boy," male, white, Italian, dark hair, fair complexion, approximately 5' 9", stocky-build, between twenty-eight and thirty-two years of age, B# unavailable at this time, listed by the Federal Government as a major narcotics violator and suspected of transporting, distributing, and selling heroin in large quantities.

18. I am further informed by Detective McCrorie that on October 6, 1971 that between the hours of 11:00 p.m. and 11:30 p.m., JOSEPH DELLA VALLE, Raymond Rescildo, and another, unidentified male were seen in the tree area described in paragraph 16, entering and exiting a 1971 Oldsmobile Cutlass, the 1968 black and white Oldsmobile Toronado, and a 1966 black Buick Wildcat, and traveling to and from the tree area and the building 2109-2111 First Avenue.

19. I am further informed by Detective McCrorie that he subsequently went to the Delightful Restaurant, located at East 116th Street and First Avenue, New York, New York, and that he observed Raymond Rescildo speaking to a male,

white, approximately 42 - 48 years old, with dark hair, bulging eyes, approximately 5' 9", of stocky build, whom Detective McCrorie identified as Jo-Jo Manfredi, B # 277-340, listed by the Federal Government as a major narcotics violator, and that when Detective McCrorie and his fellow officer entered the restaurant, Raymond Rescildo and/or Jo-Jo Manfredi /apparently observed Detective McCrorie and his fellow officer, and ceased talking to each other, and left the restaurant, separately, shortly thereafter.

19. I am further informed by Detective McCrorie that on October 12, 1971 he observed JOSEPH DELLA VALLE drive up to the gas station located on First Avenue between East 108th Street and East 109th Street (near 2109-2111 First Avenue), in a blue 1971 Oldsmobile Toronado, and that at one point JOSEPH DELLA VALLE looked in Detective McCrorie's direction and apparently observed ~~other~~ ^{officers} ~~watching him~~ watching him, and that JOSEPH DELLA VALLE thereupon took an object from his waist and placed it into the blue 1971 Oldsmobile Toronado.

20. I am further informed by Detective McCrorie that on October 13, 1971 at approximately 8:30 p.m. he observed Raymond Rescildo driving the black and white 1968 Oldsmobile Toronado (lic. XU 9158) to 2109-2111 First Avenue; that he observed Rescildo enter said building, remain a short period of time, and then exit said premises, after having changed his clothing. I am further informed

by Detective McCrorie that at approximately 9:30 p.m. he observed JOSEPH DELLA VALLE as a passenger in the 1971 Blue Toronado; that he observed JOSEPH DELLA VALLE exit said auto and enter 2109-2111 First Avenue; and that a few minutes later he observed JOSEPH DELLA VALLE return to said auto with a female, white, and ride off in the 1971 blue Toronado.

21. I am further informed by Detective McCrorie that at approximately 11:30 p.m. on October 13, 1971 he observed a female, white, blond hair, approximately 5' 8", medium weight, riding as a passenger in the above mentioned 1971 blue Toronado; that he observed said female exit said vehicle in front of 2109-2111 First Avenue; and that he observed her enter said building, carrying a large manila envelope.

22. I am further informed by Detective McCrorie that on the evening of October 21, 1971 he observed JOSEPH DELLA VALLE enter the premises 2109-2111 First Avenue, and exit a short time later.

23. On October 28, 1971, at approximately 8:10 p.m., I observed JOSEPH DELLA VALLE leave the Bar and Grill at 2034 Second Avenue, and drive in the black and white 1968 Oldsmobile Toronado (lic. XU 9158) to Patsy's Restaurant, at 118th Street and First Avenue, where he was met

by a male, white, stocky, dark-haired individual, approximately 42 - 48 years old, with bulging eyes, whom I identified as Jo-Jo Manfredi, B #277-340, listed by the Federal Government as a major narcotics violator.

MANFREDI WAS CONVICTED AND SENTENCED TO A TERM OF MORE THAN ONE YEAR FOR NARCOTICS VIOLATION.

24. On October 29, 1971, approximately one half hour after I overheard the conversation between my confidential informant and JOSEPH DELLA VALLE (paragraph 14), I observed JOSEPH DELLA VALLE leave the Bar and Grill at 2034 2nd Avenue and further observed him drive the above mentioned 1968 Black & White Oldsmobile Toronado to the Delightful Restaurant, located at East 116th Street and First Avenue, where I observed him meet Jo-Jo Manfredi, engage Manfredi in conversation for approximately twenty minutes, and leave. Manfredi also left, in a different car and in a different direction.

25. On November 2nd, 1971, at approximately 2:37 p.m., I observed JOSEPH DELLA VALLE at the Bar and Grill at 2034 Second Avenue, in conversation with one Frank Barone, a/k/a John Pizzo, B 475-082, who I have previously arrested for Sale and Possession of heroin (Ind. No. 4288/71, New York County, still pending).

26. On November 4, 1971 from approximately 6:00 p.m. to approximately 7:45 p.m. I was in the vicinity of the bar and grill at 2034 Second Avenue, New York, New York, and the premises 2109-2111 First Avenue, New

York, New York, and was unable to observe any of the individuals or vehicles mentioned above.

27. On November 16, 1971 from approximately 2:00 p.m. to approximately 4:00 p.m. I was in the vicinity of the bar and grill at 2034 Second Avenue, New York, New York, and the premises 2109-2111 First Avenue, New York, New York, and was unable to observe any of the individuals or vehicles mentioned above.

28. On November 17, 1971 from approximately 10:00 a.m. to approximately 12:00 p.m. I was in the vicinity of the bar and grill at 2034 Second Avenue, New York, New York, and the premises 2109-2111 First Avenue, New York, New York, and was unable to observe and of the individuals or vehicles mentioned above.

29. On November 18, 1971 from approximately 10:00 a.m. to approximately 6:00 p.m. I was in the vicinity of 1475 Thieriot Avenue, Bronx, New York. Throughout that entire period I observed the above-mentioned 1968 Black and White Oldsmobile Toronado parked nearby, but I did not observe any of the individuals mentioned above.

30. On November 26, 1971, at approximately 1:30 p.m., I went to the area of 2034 Second Avenue, but was unable to observe any of the automobiles or individuals previously mentioned. At approximately 1:50 p.m. I went to the area of 2109-2111 First Avenue, New York, New York, but was unable to observe any of the individuals or vehicles previously mentioned. At approximately 2:25 p.m.

I went to the area of 1475 Thieriot Avenue, Bronx, New York, but was similarly unable to observe any of the individuals or vehicles previously mentioned.

31. Based on the above information and observations, there is probable cause to believe that JOSEPH DELLA VALLE has been and is engaged in the crimes of criminal possession of a dangerous drug as a felony and criminally selling a dangerous drug as a felony, in violation of article 220 of the Penal Law, both of which are crimes punishable by more than one year. There is also probable cause to believe that conversations of JOSEPH DELLA VALLE with co-conspirators, accomplices and agents on said telephones will constitute evidence of said crimes.

32. The type of conversations to be overheard are, specifically, conversations of JOSEPH DELLA VALLE with his customers, suppliers, co-conspirators and agents, pertaining to the purchase, sale, transfer, shipment or possession of narcotic drugs.

33. I am not in possession of any information which would indicate that any of the conversations sought to be overheard may be expected to come within any privilege under any applicable rule of law.

34. I have been conducting an investigation of JOSEPH DELLA VALLE since the latter part of September, 1971,

and during this time I have been unable to accumulate sufficient evidence against him through normal investigative procedures to have him successfully prosecuted. Observations made by myself, Detective William McCrorie, and Detective King Barsella, No. , indicate that JOSEPH DELLA VALLE and his co-conspirators constantly use several automobiles when traveling to and from the various locations discussed above. At the meeting area at East 115th Street and Second Avenue, the drivers and passengers of all of the automobiles usually leave their autos, walk and talk in the tree area at various times during the evening, and are constantly arriving and departing from approximately 8:00 p.m. to approximately 11:30 p.m. When any of the individuals is seen to enter one of the autos and drive south on Second Avenue, the others remaining in the tree area have been observed to be watching the departing auto, apparently to see if any autos follow the auto which has just left them. When a car does leave the tree area with one of the observed individuals inside, said car usually goes east on East 108th or East 106th Street, north on First Avenue, and west on East 115th Street or East 116th Street until it makes another pass past the tree area. Surveillance of JOSEPH DELLA VALLE and the individuals with whom he meets is therefore very difficult, particularly so when the observers are seeking to avoid being detected.

It is my opinion that, because of previous narcotics investigations I have conducted in this part of New York County, and because I have arrested at least one of the individuals with whom JOSEPH DELLA VALLE has been observed ^{ing} speak/(Frank Barone, Paragraph 25, above), there is a strong likelihood that I might be identified or recognized as a police officer if I continue to attempt constant close surveillance on JOSEPH DELLA VALLE or the other individuals or on the areas mentioned in the above paragraphs. I am informed by Detective McCrorie that in his opinion Raymond Rescildo and/or Jo-Jo Manfredi on at least one occasion recognized him and his fellow officer as policemen, or suspected that he and his officers were policemen (paragraph 18, above). I am further informed by Detective McCrorie that in his opinion JOSEPH DELLA VALLE observed ^{other officers} ~~Detective McCrorie~~ watching JOSEPH DELLA VALLE on at least one occasion, and therefore attempted to rid himself of contraband he had been carrying in his possession (paragraph 19, above). Surveillance of JOSEPH DELLA VALLE and the individuals with whom he meets is therefore very difficult, particularly so since JOSEPH DELLA VALLE and those with whom he meets apparently have been attempting to ascertain whether they are being watched and followed, and particularly so since the success of this investigation depends in part in guaranteeing that

the investigators are not detected by the subjects of the investigation.

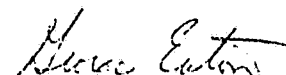
35. While my confidential informant has personally participated in a successful narcotics investigation for me in the past (paragraph 3, above), he has done so under a different name and a different "cover" than that by which he is known to JOSEPH DELLA VALLE. I am informed by my confidential informant that he is unwilling to introduce an undercover agent to JOSEPH DELLA VALLE, or attempt to buy heroin from JOSEPH DELLA VALLE, or even meet personally with JOSEPH DELLA VALLE, because he fears that such action on his part would expose him to serious risk of being recognized, and quite possibly killed. It is my opinion that JOSEPH DELLA VALLE does not at this time connect my confidential informant with this earlier investigation, but that if my informant actually met again with JOSEPH DELLA VALLE, there is a substantial risk that JOSEPH DELLA VALLE or one or more of DELLA VALLE's co-conspirators, accomplices or agents might recognize my informant as a participant in the previous investigation, and that such recognition would likely result in the death of my informant.

36. Under these circumstances, I respectfully request that an order in the annexed form be issued by this Court.

37. It is impossible to predict what particular time of day the telephone conversations may take place. It is, therefore, respectfully requested that the annexed eavesdropping warrant be effective for a period of thirty (30) days from the effective date and at any time during the day or night.

38. It is further requested that this order for interception not automatically terminate when the above-described type of communication has been first obtained. Considering the continuing nature of the criminal activity involved herein, it is important that the interception of conversations not terminate after the first conversation concerning narcotic drugs has been intercepted.


39. To my knowledge, no previous application for the order requested herein has been made to any other court or justice.



GEORGE EATON

Sworn to before me this

6th day of December, 1971



Notary Public
Notary Public, State of New York
No. 03 2513340
Qualified in Dutchess County
Certificate Filed in N. Y. County
Term Expires March 30, 1973

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

In the Matter :

of

the interception of the telephonic communications
of JOSEPH DELLA VALLE with co-conspirators, :
accomplices and agents over telephones bearing the :
numbers 722-9595 and 824 6406, subscribed to by a :
"bar and grill" located at 2034 Second Avenue, New :
York, New York, and "M. Della Valle," apartment :
1/0, 1475 Thieriot Avenue, Bronx, New York, re-
spectively.

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STATE OF NEW YORK)
 ss.:
COUNTY OF NEW YORK)

JOHN J. HILL, being duly sworn, deposes and says:

1. I am a lieutenant-detective, in the New York City Police Department, assigned to the Special Investigation Unit of the Narcotics Division. As such, I am a superior officer to Detective George Eaton, who is also assigned to the Special Investigation Unit.

2. This affidavit is submitted in support of District Attorney Frank S. Hogan's application for an eavesdropping warrant, and in corroboration of Detective George Eaton's supporting affidavit.

3. I personally know the confidential informant to whom Detective Eaton refers in paragraph 3 and the subsequent paragraphs of his affidavit. I supervised Detective Eaton and worked with him and his confidential informant on the case referred to by Detective Eaton in paragraphs 3 and 35 of his affidavit.

4. The opinions expressed by Detective Eaton in paragraphs 3 and 35 of his affidavit, about his confidential informant, are opinions which I also hold.

5. On the evening of December 2, 1971, on the service road to the Long Island Expressway, near exit , I met with this confidential informant. I discussed with this confidential informant the facts and circumstances described by Detective Eaton in paragraphs 4, 5, 6, 7, 8, 9, 14, and 15 of Detective Eaton's affidavit.

6. During the course of this discussion, the confidential informant described the meeting he had in April of 1971 at the bar and grill at 2034 Second Avenue with John Della Valle, JOSEPH DELLA VALLE, and another person. The confidential informant told me that the other person, during the course of a four-way conversation, told this informant that John and JOSEPH DELLA VALLE would be willing to supply heroin to my informant; that John and JOSEPH DELLA VALLE confirmed thus; and that John Della Valle, in the presence of JOSEPH DELLA VALLE, gave this informant two telephone numbers at which John or JOSEPH DELLA VALLE could be reached to discuss transactions in heroin: 722 9595 and 824 6406.

7. During the course of this discussion I had with this confidential informant, the informant further told me that on October 29, 1971, shortly after 8 p.m., in Detective Eaton's presence, he dialed telephone number 722 9595 and had a conversation with JOSEPH DELLA VALLE and that during this conversation he discussed with JOSEPH DELLA VALLE the purchase of a kilogram of heroin which could be diluted four times (referred to in the conversation as a "house with four

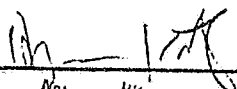
rooms") for \$18,000.

8. During the course of this discussion I had with this confidential informant, the informant further told me that on November 2, 1971, shortly after 8 p.m., in Detective Eaton's presence he dialed telephone number 824 6406 and had a conversation with JOSEPH DELLA VALLE, and that during this conversation he again discussed the purchase of a kilogram of heroin which could be diluted four times (referred to in the conversation as a "house" which could be "hit" four times).


JOHN W. HILL

Sworn to before me this

8th day of December, 1971,


HYMAN KATZ
Notary Public, State of New York
No. 03-204330
Qualified in Bronx County
Certificate Filed in N. Y. County
Term Expires March 30, 1973

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter

of

:
AFFIDAVIT

the interception of telephonic communications
of JOSEPH DELLA VALLE with co-conspirators,
accomplices, and agents over the telephones bear-
ing the numbers 722 9595 and 824 6406, subscribed :
to by a "bar and grill" located at 2034 Second
Avenue, New York, New York, and "M. Della Valle," :
apartment 1/0, 1475 Thieriot Avenue, Bronx, New :
York, respectively.
-----X

STATE OF NEW YORK)
 ss.:
COUNTY OF NEW YORK)

WILLIAM McCrorie, being duly sworn, deposes and says:

1. I am a detective in the New York City Police Department, shield No. 556, presently assigned to the 79th Detective Squad. During the month of October and the early part of November, 1971, I was assigned to the Special Investigation Unit of the Narcotics Division.

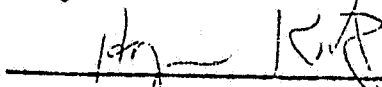
2. This affidavit is submitted in support of District Attorney Frank S. Hogan's application for an eavesdropping warrant, and in corroboration of the affidavit submitted by Detective George Eaton in support of Mr. Hogan's affidavit.

3. I have read the affidavit of Detective George Eaton. All statements in that affidavit attributed to me are based upon my own knowledge, and are true.


William McCrorie

Sworn to before me this

6th day of December, 1971


Notary Public, State of New York
No. 02-2877, 50

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----- X

In the Matter :

of :

the interception of telephonic communications
of JOSEPH DELLA VALLE (a/k/a "Blackie,"
a/k/a "Jimmy," a/k/a "Jeezy") and STEVEN : EXTENSION AND
DELLA CAVA (a/k/a "Steve," a/k/a "Eddie") : AMENDMENT OF
with co-conspirators, accomplices, and : EAVESDROPPING
agents over the telephone bearing the : WARRANT
number 722-9595, subscribed to by a "bar
and grill" located at 2034 Second Avenue,
New York, New York :

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It appearing from the affidavit of Frank S. Hogan,
District Attorney of the County of New York, and the accom-
panying affidavit of Detective George Eaton of the Special
Investigation Unit, Narcotics Division, New York City Police
Department, said affidavits having been submitted in support
of this extended and amended eavesdropping warrant and in-
corporated herein as a part hereof, that there is probable
cause to believe that evidence of the crimes of criminal
possession of a dangerous drug as a felony and criminal sale
of a dangerous drug as a felony, in violation of article 220
of the Penal Law of the State of New York, may be obtained
by intercepting the telephonic communications transmitted
over the telephone lines and instrument assigned number
722-9595 described above, and the Court being satisfied that
comparable evidence essential for the prosecution of said
crimes could not be obtained by other means, it is

ORDERED, that the District Attorney of the County of
New York, or any police officer acting under his direction
is hereby authorized and empowered to intercept and record
telephonic conversations of JOSEPH DELLA VALLE and also


telephonic conversations of STEVEN DELLA CAVA, with each other and with their co-conspirators, accomplices, and agents, over the above-described telephone pertaining to the purchase, sale, transfer, shipment or possession of narcotic drugs relating to the above mentioned crimes; and it is further

ORDERED, that the agents and employees of the New York Telephone Company are directly constrained not to divulge the contents of this order nor the existence of electronic eavesdropping over the above-captioned telephone lines and instrument to any person, including but not limited to the subscribers of the above-captioned telephone instrument, whether or not the said subscribers request that the said telephone instrument be checked for the existence of said electronic eavesdropping equipment, and it is further

ORDERED, that this order shall be conducted in such a way as to minimize the interception of communications not related to the aforementioned crimes and that nothing herein contained shall be construed as authorizing the District Attorney or his agents to intercept or overhear any communications of JOSEPH DELLA VALLE, or of STEVEN DELLA CAVA, which are otherwise privileged; and it is further

ORDERED, that this order shall be executed as soon as practicable and shall be effective from the 6th day of January, 1972 and shall continue until evidence as described in the aforementioned affidavits shall have been obtained, and said authorization shall not automatically terminate when the communications described herein have been first obtained, but in no event to exceed thirty (30) days from said effective date, i.e. February 4th, 1972.

DATED: New York, January 6th, 1972.



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter :

of :

the interception of telephonic communications
of JOSEPH DELLA VALLE (a/k/a "Blackie,"
a/k/a "Jimmy," a/k/a "Joey") and STEVEN
DELLA CAVA (a/k/a "Steve," a/k/a "Beansie")
with coconspirators, accomplices, and
agents over the telephone bearing the
number 722-9595, subscribed to by a "bar
and grill" located at 2034 Second Avenue,
New York, New York.

AFFIDAVIT IN
APPLICATION OF
ORDER REVENING
AND AMENDING
EAVESDROPPING
WARRANT

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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss :

FRANK S. HOGAN, being duly sworn, deposes and says:

1. I am the District Attorney of the County of New York, and as such make this affidavit in support of an application for an order amending and extending an eavesdropping warrant authorizing the interception of telephonic communications.

2. The warrant which is now sought to be amended and extended was issued by the Hon. Harold Birns, Justice, New York State Supreme Court, in the County of New York, on December 8, 1971, and was assigned New York County District Attorney's Office eavesdropping warrant number "87-Narcotics."

3. The amendment which is now sought is that the aforementioned warrant be amended to authorize the interception of telephonic communications of STEVEN DELLA CAVA as well as the telephonic communications of JOSEPH DELLA VALLE, and their co-conspirators, accomplices and agents over the telephone bearing the number 722-9595, subscribed to by a bar and grill located at 2034 Second Avenue, New York, New York.

4. The extension which is now sought is that the aforementioned warrant be extended for an additional period of thirty (30) days.

5. I have read the affidavit of Detective George Eaton, Shield # 1248, assigned to the Special Investigations Unit, Narcotics Division, of the New York City Police Department.

6. Based upon the facts set forth in that affidavit, I respectfully submit to the Court that there is probable cause to believe that essential evidence of the crimes referred to therein may be obtained by the interception of the above-described telephone communications of the above-named individuals over the above-described telephone.

7. In my opinion there are no alternative investigative procedures that could be used to acquire the essential evidence necessary to prosecute successfully the violators of the crimes described therein. I believe that the nature and scope of the criminal activities involved is of sufficient importance to warrant the continued employment of electronic interception devices.

WHEREFORE, it is respectfully requested that the annexed amended eavesdropping warrant be issued and extended and made effective from the effective date, January 6, 1972, and until and including the 4th day of February, 1972.

No previous application for the relief sought herein has been made to any other court or justice.

Frank S. Hogan
FRANK S. HOGAN

Sworn to before me this

6th day of January, 1972

John R. Kramer
JOHN R. KRAMER
Notary Public, State of New York
Qualified in New York County
Commission Expires January 20, 1973

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter :

of :

the interception of telephonic communications : AFFIDAVIT IN
of JOSEPH DELLA VALLE(a/k/a "Blackie", a/k/a : APPLICATION OF
"Jimmy" and a/k/a "Joey") and STEVEN DELLA : ORDER RENEWING
CAVA(a/k/a "Steve", a/k/a "Beansie") with co- : AND AMENDING
conspirators, accomplices, and agents over : EAVESDROPPING
the telephone bearing the number 722-9595, : WARRANT
subscribed to by a "bar and grill" located at :
2034 Second Avenue, New York, New York. :

- - - - - x

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss :

Detective George Eaton, being duly sworn, deposes and says:

1. I am a detective in the New York City Police Department, assigned to the Special Investigation Unit of the Narcotics Division, and I am presently conducting an investigation to determine whether certain crimes of criminally possessing a dangerous drug as a felony, and criminally selling a dangerous drug as a felony, both of which are crimes under Article 220 of the Penal Law and punishable by imprisonment for more than a year, have been and are being committed by JOSEPH DELLA VALLE and his co-conspirators, accomplices and agents in the County of New York.

2. This affidavit is submitted in support of District Attorney Frank S. Hogan's application for renewal and amendment of an eavesdropping warrant, in addition to the verified affidavit submitted by me on December 8, 1971 and incorporated herein as part hereof and a photostatic copy of which is attached as appendix A.

3. The warrant which is now sought to be amended and extended was issued by the Hon. Harold Birns, Justice, New York State Supreme Court, on December 8, 1971 and was assigned New York County District Attorney's Office eavesdropping warrant number "87-Narcotics." That warrant authorized the interception of telephonic communications of JOSEPH DELLA VALLE and his co-conspirators, accomplices and agents over the telephones bearing the number 722-9595, subscribed to ^{by} a bar and grill at 2034 2d Av New York, and the number 864-6405, subscribed to ^{by} M. Della Valle," Apartment 1-0, 1475 Thieriot Avenue, Bronx, New York.

4. The amendment which is now sought is that the aforementioned warrant be amended and extended to authorize the interception of telephonic communications of JOSEPH DELLA VALLE and also of STEVEN DELLA CAVA and their co-conspirators, accomplices and agents over the telephone bearing the number 722-9595, subscribed to ^{by} the above mentioned bar and grill at 2034 Second Avenue, New York, New York.

5. At various times and dates during the month of December, 1971 Detective Peter Morgan, # 1107, SIU-ND and Detective Lester Wolff; #1029, SIU-ND, intercepted telephone calls made to or from the telephone numbered 824-6406 and recorded these conversations. I subsequently listened to tape recordings of several of these conversations. I heard a recording of a telephone call and conversation made on December 11, 1971, at approximately 12:50 PM, during which JOSEPH DELLA VALLE spoke to another individual and responded to the nickname "JIMMIE." I also listened to a recording of a telephone call and conversation which was made on December 12, 1971 at approximately 3:20 PM during which JOSEPH DELLA VALLE spoke to another individual and answered to the nickname "BLACKIE." I have heard tape recordings of other conversations in which JOSEPH DELLA VALLE

responds and answers to these nicknames. It is therefore my conclusion that additional references to "JOEY," "BLACKIE," and "JIMMY" in other conversations may indeed be references to JOSEPH DELLA VALLE.

6. I am informed by Detective Wallace Millard, #1415, S.I.U.-N.D., that on December 11, 1971 at approximately 7:16 PM he intercepted an incoming telephone call made to the bar and grill, by a man whose voice sounds like that of a Negro man, and overheard the following conversation:

In: Hello

Out: How you feeling?

In: Not so good pal

Out: Well

In: Not so good

Out: Well

In: Well I think we gotta wait til Monday

Out: Alright

In: Alright my buddy

Out: Alright

In: I'm sorry I can't help you

Out: Well what are you gonna do

In: Well what's there is there right

Out: Alright

In: Okay bud

I also heard this conversation on December 11, 1971. At the time I heard it, I was unable to ascertain with certainty the identity of the individual in the bar who received the phone call. Neither participant to the conversation identified himself. However, subsequent investigation(detailed below) leads me to the conclusion that the participant to the conversation who

received the telephone call in the bar was in fact STEVEN DELLA CAVA.

7. On December 13, 1971 at approximately 8:20 PM I intercepted an incoming telephone call made to the bar and grill, by a person whose voice sounded like that of a Negro man, and overheard the following conversation:

In: Hello

Out: How you feel?

In: Nah, nah, sick, sick really.

Out: Me and you both

In: My god, alright try and keep in touch with me, hah, Pal

Out: Bye

In: Okay

At the time I heard this conversation, I was unable to ascertain with certainty ~~whether~~ the identity of the individual in the bar who received the phone call, ^{whose voice} ~~which~~ sounded similar to the voice of the individual in the bar who received the call detailed in paragraph 6 above. Neither participant to the conversation identified himself. However, subsequent investigation (detailed below) leads me to the conclusion that the participant to the conversation who received the call in the bar was in fact STEVEN DELLA CAVA.

8. I am informed by Detective Millard that on December 15, 1971 at approximately 6:46 PM he intercepted an outgoing telephone call made from the bar and grill to telephone number 914 576-0398, and overheard the following conversation:

...
In: This is Stevie

Out: Hello

In: Hello John

Out: Yeah

In: How you feel?

Out: So-so

In: Huh?

Out: I just got in

In: Yeah, you probably didn't feel good last night you didn't come down at all

Out: Nah I didn't come down at all

In: You didn't sound good when I left you

Out: No

In: I seen this fellow, you gonna come down tonight or what

Out: Which fellow?

In: You know the guy we talk to the night before we went home

Out: Yeah, and whats what?

In: Well, you know

Out: He wants to see me?

In: No, but a just a, a you don't have to come down tonight, I'll definitely see you tomorrow, though

Out: Yeah. tomorrow I definitely will

In: Alright

Out: No question . . .

I am further informed by Detective Millard that at that time he did not know who "Stevie" was.

Subsequently I listened to the tape recording which was made of this conversation. The voice of the man who identified himself as "Stevie" sounded similar to that of the voice of the unidentified man in the bar who participated in the conversations detailed in paragraphs 6 and 7 above. Subsequent investigation (detailed below) leads me to the conclusion that "Stevie" is in fact STEVEN DELLA CAVA.

9. On December 19, 1971 at approximately 2:59 PM I intercepted a telephone call made from the bar and grill to telephone number

A-269

222-7755, and overheard the following conversation:

In: Hello Doris

Out: Yes

In: Joey. Where is King?

Out: Oh, yes, he's here why?

In: I want to see him, talk to him...

Out: ..."Mall King," Hello Jim...

Out: ...How are you doing?

In: Listen you want to meet me now?...

In: ...alright look remember the bar, I met you, Tina's East

Out: Where?

In: Remember the bar Tina's East, theres a bar 105 and 104
Streets, 2d Avenue

Out: Yeah

In: Address 2034

Out: Just a minute, 2034

In: What time you be down?

Out: Let me see, (Away from phone "Dottie what time we can be
there? 2034 2d Avenue")

In: Oh look, I meet you King, I'll meet you alone

Out: Yeah, yeah, but can't I take Dottie?

In: It's only going to be 5 minutes to you all go, you know
what I mean

Out: Yeah, because we have to go to another place and we pass
through there

In: Well what time?...

Out: Can we get it in an hour?

In: In a hour, hour, hour

Out: Its 3 now

In: Its 3 now, wait a while (Male speaks to someone inside
the bar; "How long you gonna be here Beans?") Hey King
I'll meet you about 3:30

Out: 3:30 Okay

In: Yeah 3:30 okay

Out: 3:30 or 4

In: Yeah, its the little bar...

I was able to recognize the voice of the man in the bar, who made the phone call, and who identified himself as "Joey," as that of JOSEPH DELLA VALLE.

10. On December 20, 1971 at approximately 6:24 PM I intercepted an incoming telephone call made to the bar and grill, and overheard the following conversation:

In: Hello

Out: Joey? Whose this?

In: Beansie

Out: Beansie, Fred

In: Yeah

Out: Listen you know, if Sleepy ordered the plants for the old man

In: Yeah, he did, Yeah the guys gonna, I heard him speaking to the guy yesterday

Out: He's gonna deliver

In: The guys gonna deliver them tomorrow

Out: Before Christmas, One?

In: Yeah Tuesday

Out: One of them he's gonna deliver

In: Two he said, I don't know

Out: Well I took one already

In: Well then, thats the one...

Out: Listen

In: Yeah

Out: Tell that kid "Jimmy," you know

In: What?

Out: You know about the other "thing"

In: What happened?

Out: Ah nothing, I'll tell you when I see . . .

The voice of the individual who received the telephone call in the bar sounded similar to that of the voice of the man in the bar who participated in the conversations which are detailed in paragraphs 6, 7, and 8.

11. I am informed by Detective William Roache, # 358, that on December 21, 1971 at approximately 8:27 PM he intercepted an incoming telephone call to the bar and grill and overheard the following conversation:

In: Hello

Out: Hi Buddy

In: Hey Bud

Out: How you feeling?

In: Alright, How are you?

Out: A'r lousy I guess

In: Me too, not so good

Out: Ha Ha you are

In: I was supposed to have a "Christmas Party," someone died in the family and we ain't gonna have it before Christmas

Out: O my God, do you ain't gonna have it before Christmas

In: No, I doubt that

Out: Okay then Pops

In: You know no sense lying

Out: Yeah, well my cousin, he's

In: Yeah, he's sick, eh

Out: Yeah he's sick too

In: Yeah

Out: Yeah, alright then well have a Happy one anyway

In: You too, I gotta see you Thursday anyway, I gotta bring you up a present anyway .

Out: Okay Pops

In: So I'll be up there Thursday

Out: Okay Pops

In: Be home Thursday

Out: I'll be here Yeah

In: Okay I'll be up there to see you

Out: Okay Buddy

In: Okay

Out: Alright Bye, Bye

In: So long

I subsequently listened to the tape recording which was made of this conversation. The voice of the recipient in the bar (who did not identify himself) sounded similar to that of the individual in the conversations referred to in paragraphs 6 and 7 and the individual in paragraph 8 who identified himself as "Stevie" and the individual in the conversation detailed in paragraph 10, who identified himself as "Beansie." Subsequent investigation (detailed below) leads me to the conclusion that the person who received this telephone call is STEVEN DELLA CAVA.

12. I am informed by Detective Millard that on December 21, 1971 at approximately 10:10 PM he intercepted an incoming telephone call made to the bar and grill and overheard the following conversation:

In: Hello

Out: Hello

In: Whose this Tony?

Out: Yeah

In: Hello Buddy

Out: Whats happening Buddy?...

In: ...I called your house, you know, did she tell you anything?

Out: No, I didn't see her yet

In: Ah, shit, I thought it meant for you to come in until Thursday were having a The Party.

Out: Inaudible

Out: O I'm gathering up all that liquor, you know, we're opening up Liquor Store

In: Yeah

Out: We got two hundred and fifty bottles of Liquor

In: Yeah, yeah, I know, I know

Out: Mother fucker, you know

In: Yeah, I know, Whats the sense talking about it, you know

Out: I know what you mean

In: You know Buddy, I would love to,

Out: Yeah, What you want me to do, want me to call you

In: Are you back home

Out: No, yeah I'm home now

In: O, alright come in, I want to give you something anyway I want to give you a Christmas presents, so come in, anyway Thursday, and we'll talk about it and we'll know what we're doing, Okay Bud.

Out: Okay Baby

In: But come in

Out: Okay

In: Alright Buddy

Out: Right On Buddy

In: Okay Buddy

I subsequently listened to the tape recording which was made of this conversation. The voice of the man who received this call in the bar (who did not identify himself) sounded similar to that of "BEANSIE" in the conversation detailed in paragraph 10, above, and that of "STEVIE's" in the conversation detailed in paragraph 8 and the unidentified person in the bar in the conversations detailed in paragraphs 6 and 7. Subsequent investigation indicates that the participant in this investigation was in fact STEVEN DELLA CAVA.

13. On December 23, 1971 at approximately 6:30 PM I intercepted a telephone call made from the bar and grill to telephone number 822-9005, and overheard the following conversation:

Out: Hello

In: Hello

Out; Yeah

In: Beansie

Out: Yeah

In: Whats up? Anything?

Out: No not really, No

In: Do I bring anybody anything? You, like got a "present" for them people?

Out: Yeah

In: You want me to pick IT up, up there or what?

Out: Yeah

In: You're gonna stay a while

Out: Yeah

In: Alright Bud, thats what I wanted to know

Out: Okay

In: Okay

I was able to recognize the voice of the man in the bar who made the telephone call and identified himself as "BEANSIE" as the same individual as the man who identified himself as "STEVIE" in the conversation detailed in paragraph 8, above, and the man who identified himself as "BEANSIE" in the conversation detailed in paragraph 10, above and the man in the bar in the conversation detailed in paragraphs 6 and 7, above. Subsequent investigations detailed below leads me to the conclusion that the individual was in fact STEVEN DELLA CAVA.

HWL 14. ~~I am informed by the New York Telephone Company that the~~

14. I am informed by the New York Telephone Company that the telephone numbered 822-9005 is registered to "Ray's Stationery Store" located at 3205 Westchester Avenue, Bronx, New York.

15. At 6:35 P.M. and again at 8:00 P.M. on December 23, 1971 I went to the bar and grill located at 2034 Second Avenue.

At 8:10 P.M. I observed JOSEPH DELLA VALLE, driving a blue Cadillac, New York Registration XU 9159, registered to his brother John Della Valle, circle the block of 2034 Second Avenue.

At 8:15 P.M. I observed JOSEPH DELLA VALLE, driving the aforementioned Cadillac, circle the block of 2034 Second Avenue.

At 8:20 P.M. I observed JOSEPH DELLA VALLE, driving the aforementioned Cadillac, circle the block of 2034 Second Avenue.

At 8:28 P.M. I observed JOSEPH DELLA VALLE, driving the aforementioned Cadillac, circle the block of 2034 Second Avenue and then double park in front of the premises. I observed JOSEPH DELLA VALLE remain in his vehicle and wave to someone inside the bar and grill at 2034 Second Avenue, and then drive away from the area of 2034 Second Avenue.

16. At 8:30 P.M. on December 23, 1971, approximately two minutes after JOSEPH DELLA VALLE drove away from the location of the bar, a male, white, approximately 5' 6" tall, with black curly hair, of a stocky build, wearing a dark overcoat and eyeglasses, got into a late model dark Buick Electra, New York Registration 4782 XZ.

17. I am informed by the New York Motor Vehicle Bureau that the above mentioned Buick Electra is registered to STEVEN DELLA CAVA, 2267 Second Avenue, New York, New York.

18. I am informed by the New York Police Department Bureau of Criminal Identification that STEVEN DELLA CAVA is known to the New York City Police Department as B# 213-355. He has been arrested at least 11 times between 1945 and 1968. He was arrested at least 5 times by Federal Authorities for narcotics violations. I am further informed by the B.C.I. that in 1968 STEVEN DELLA CAVA was approximately 43 years old and was approximately 5'5" and weighed approximately 190 pounds. I am informed by the Criminal Intelligence Division of the New York City Police Department that in previous investigations of STEVEN DELLA CAVA, DELLA CAVA has been known to use the nickname "BEANSIE".

19. The male, white, described in paragraph 16, who entered the Buick Electra described in paragraph 16, is believed to be STEVEN DELLA CAVA, a/k/a "BEANSIE", a/k/a "STEVIE".

20. I observed STEVEN DELLA CAVA drive the above mentioned Buick Electra to the vicinity of 3203 Westchester Avenue, Bronx, New York, which appears to be a meat market, and double park his vehicle in front of that address. 3203 Westchester Avenue is located next to the stationery store at 3205 Westchester Avenue to which STEVEN DELLA CAVA made the telephone call detailed in paragraph 13, above.

At approximately 9:05 P.M. I observed STEVEN DELLA CAVA exit his vehicle and enter the premises at 3203 Westchester Avenue. I observed that people were inside said premises, but that the lights of said premises appeared to be out.

A few minutes thereafter I observed STEVEN DELLA CAVA exit the premises 3203 Westchester Avenue with what appeared to be a set of keys in his hand.

I observed STEVEN DELLA CAVA walk to a dark Lincoln Continental and open the trunk of this car and remove a package, wrapped in brown

wrapping paper, approximately 3" by 4" by 8". This package was similar in size and shape to packages I have seen which have contained a half kilogram of heroin.

I observed STEVEN DELLA CAVA take this package and put it into the trunk of his Buick Electra. I then observed STEVEN DELLA CAVA return to the premises 3203 Westchester Avenue and emerge a short time thereafter at approximately 9:10 P.M., apparently empty-handed.

21. After STEVEN DELLA CAVA emerged from 3203 the second time, I observed him get back into his Buick Electra and drive north two blocks to the Chateau Pelham (which is listed in the Bronx Telephone Directory as a catering establishment) located at 3250 Westchester Avenue, Bronx, New York. I observed that he entered the premises 3250 Westchester Avenue empty-handed and emerged a few minutes thereafter with a large manilla envelope, which he placed in the trunk of his vehicle. I observed that he then got back into his vehicle at approximately 9:15 P.M.

22. At this time I followed STEVEN DELLA CAVA as he took the following route: Bruckner Expressway south to the Cross Bronx Expressway west, then to the Henry Hudson Parkway south to the 79th Street exit, then on 79th Street onto West End Avenue southbound. During this entire trip STEVEN DELLA CAVA was travelling at approximately 80 to 85 miles per hour, changing lanes frequently, and nearly caused one collision. He was apparently driving so as to shake a possible trailing vehicle. At approximately 9:30 P.M. in the vicinity of West End Avenue I lost sight of his vehicle.

23. At approximately 9:50 P.M. on December 23, 1971 I returned to the location of the bar at 2034 Second Avenue, New York, New York and observed the above mentioned Buick Electra parked in front of the bar, where it remained until at least 11:00 P.M.

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24. On December 27, 1971, at approximately 5:15 P.M., I observed STEVEN DELLA CAVA, driving the Buick Electra described in paragraph 16, above, pull up to the premises 2034 Second Avenue, New York, New York and go inside.

I am informed by Detective Peter Morgan, # 1107, that on December 27, 1971, at approximately 6:15 P.M., he intercepted an incoming telephone call made by a voice which sounded like that of a male, Negro, and overheard the following conversation:

Beansie:(in) Hello.
Male Negro(out) How you feeling?
Beansie:(in) All right, Buddy, how you been?
Male Negro(out) Well I could do better, but ain't no use crying. Listen
Beansie:(in) Yeah
Male Negro(out) My people didn't show down there, like they suppose to
Beansie:(in) Yeah well
Male Negro(out) Any chance me seeing you for myself, so I could get those
Beansie:(in) Well no, I don't think anything's going to happen anyway, you know
Male Negro(out) (Inaudible)
Beansie:(in) The moving van people don't have no point and time
Male Negro(out) A huh
Beansie:(in) So I gotta made another appointment with them
Male Negro(out) A huh
Beansie:(in) All right?
Male Negro(out) Maybe they'll get in to me tomorrow
Beansie:(in) Yeah, probably, all right?
Male Negro(out) All right
Beansie:(in) Okay

Subsequently I listened to a tape recording of this conversation. I have also studied and listened to the conversations detailed in paragraphs 6 through 8, and 10 through 13 as well as the conversation detailed in paragraph 24.

After this study, I am convinced that the man in the bar who participated in all of these conversations, who identified himself as "STEVIE" in the conversations detailed in paragraph 8, who identified himself as "BEANSIE" in the conversations detailed in paragraphs 10 and 13, and who participated in the conversations detailed in paragraphs 6, 7, 11, 12, and 24, are all the same man. After this study, and after the observations and incidents and information related above, I am convinced that this man is in fact STEVEN DELLA CAVA.

25. I have been a member of the New York City Police Department for $8\frac{1}{2}$ years. I have been a Detective and have been assigned to the Narcotics Division for $2\frac{1}{2}$ years. I have been assigned to the Special Investigations Unit of the Narcotics Division for 5 months. During the $2\frac{1}{2}$ years I have been assigned to the Narcotics Division, I have participated in excess of 100 narcotics arrests.

It is known to the Narcotics Division that because of the dock strike which has greatly slowed or prevented the unloading of ship-loaded cargo in the port of New York City and other east coast ports, there has been a marked "famine" or lack of heroin and other narcotic drugs available for illegal distribution and sale.

In light of this "famine", it is my opinion that many of the conversations which have been detailed above are properly interpreted as an indication that one or both of the participants to the conversations have been unable to locate a source of heroin for purchase, sale, transfer, shipping or possessing.

Thus, in the conversation between STEVEN DELLA CAVA and the unknown male Negro of December 11, 1971, detailed in paragraph 6, above, DELLA CAVA is telling his caller that he is "not so good, pal", and that "Well, I think we gotta wait 'til Monday"; when the caller remarks, "Well, what are you gonna do", DELLA CAVA replies, "Well, what's there is there, right?" STEVEN DELLA CAVA is telling his caller that as of that date DELLA CAVA cannot supply his caller with drugs, but that he might have some on the following Monday (December 13, 1971).

Similarly, in the conversation of Monday, December 13, 1971, detailed in paragraph 7, above, an unidentified male Negro again speaks to STEVEN DELLA CAVA. DELLA CAVA says "Nah, nah, sick, sick, ~~sick~~ *stuck* really", and the caller agrees, "Me and you both", and DELLA CAVA and the caller agree to "keep in touch". This entire conversation is 28 words long. In my opinion the proper interpretation of this conversation is that neither the unidentified male Negro nor DELLA CAVA have been able to locate any heroin to purchase, sell, transfer, ship, or possess.

The conversation of Wednesday, December 15, 1971, detailed in paragraph 8, above, continues this "metaphor".

The conversation of Monday, December 20, 1971, ^(paragraph 10, above) between "Beansie" (STEVEN DELLA CAVA) and "Fred", indicates that a possible source of drugs has been located:

...

Fred:	Listen you know, if Sleepy ordered the plants for the old man?
Beansie:	Yeah, he did, yeah, the guy's gonna, I heard him speaking to the guy yesterday.
Fred:	He's gonna deliver.
Beansie:	The guy's gonna deliver them tomorrow.
Fred:	Before Christmas, one?
Beansie:	Yeah, Tuesday.
Fred:	One of them he's gonna deliver.
Beansie:	Two he said, I don't know.

Fred: Well, I took one already.

Beansie: Well, then, that's the one...

This conversation indicates that "the guy" has delivered one unit of heroin (a "plant") to Fred, and that "Beansie" (STEVEN DELLA CAVA) expects "the guy" to deliver another unit to DELLA CAVA on December 21, 1971.

Apparently, DELLA CAVA was not the only individual who expected DELLA CAVA to obtain a unit of heroin. The conversation of December 21, 1971, detailed in paragraph 11, above, opens as STEVEN DELLA CAVA and his unidentified caller agree that both feel "lousy" and "not so good". It continues:

...

Della Cava: I was supposed to have a Christmas party. Someone died in the family and we ain't gonna have it before Christmas.

Caller: Oh my God, do you ain't gonna have it before Christmas?

Della Cava: No, I doubt that.

Caller: Okay then, Pops.

Della Cava: You know, no sense lying...

This is the only conversation in which DELLA CAVA refers in any way to a "death in the family", and it is significant that no expression of condolence or sorrow is made in response; merely, "Oh my God, do you ain't gonna have it before Christmas?". The proper interpretation of this conversation is that STEVEN DELLA CAVA did not receive the package he expected, i.e. that the deal "died", and that therefore the "Christmas party" -- i.e. the distribution of heroin by DELLA CAVA to his caller and others -- will not be held before Christmas.

But approximately 103 minutes later, when another individual, "Tony", a male Negro, calls (paragraph 12, above), no mention of a "death in the family" is made, and the "party" is still on, scheduled for Thursday (presumably December 23, 1971). These latter two conversations are properly interpreted as an indication that STEVEN DELLA CAVA expected to receive a quantity of heroin on Thursday, December 23, 1971, but that while "Tony" would get a part of it, the other caller (conversation detailed in paragraph 11) would not. This is in keeping with the continued scarcity of illegal heroin available for distribution.

The telephone call made by STEVEN DELLA CAVA to the stationery store at 3205 Westchester Avenue in the Bronx, at approximately 6:30 on Thursday, December 23, 1971 ("party day"), detailed in paragraph 13, above, indicates where STEVEN DELLA CAVA ^{EXPECTED TO} obtained the quantity of heroin: *late*

...
 Della Cava: Do I bring anybody anything? You, like got a "present" for them people?
 Out: Yeah.
 Della Cava: You want me to pick it up, up there or what?
 Out: Yeah.
 Della Cava: You're gonna stay awhile?
 Out: Yeah.
 Della Cava: All right, Bud, that's what I wanted to know...

Apparently the person whom STEVEN DELLA CAVA called did indeed have a "present" for "them people", and did in fact, "stay awhile". For at 8:30 P.M. STEVEN DELLA CAVA drove from 2034 Second Avenue, New York, New York to 3203 Westchester Avenue, Bronx and picked up his "present" for "them people". (See paragraphs 16, 20 and 21.) After STEVEN DELLA CAVA obtained the "present" or "presents", he drove as if he sought to shake a tailing vehicle, and succeeded (paragraph 22, above) and eventually returned to the bar and grill at 2034 Second Avenue -- presumably for the "party" (paragraph 23).

The reference to "moving van people" in the conversation of December 27, 1971 (paragraph 24, above) is also believed to be a reference to another source of illegal heroin.

26. It is also my opinion that the conversations overheard and the observations made, clearly indicate that STEVEN DELLA CAVA is a co-conspirator, accomplice, and agent of JOSEPH DELLA VALLE. This is indicated by JOSEPH DELLA VALLE'S conversation of December 19, 1971 (paragraph 9, above). JOSEPH DELLA VALLE arranges to meet "King" at the bar at 2034 Second Avenue, but insists that "Doris" not come with "King" -- "Oh look, I meet you, "King", I'll meet you alone". It is my opinion that "King" was to come to the bar to meet JOSEPH DELLA VALLE and arrange a transaction in heroin. When DELLA VALLE is about to agree to a time for the meeting, he was overheard to have said to someone off the phone, "How long you gonna be here, Beans?" "Beansie" is an alias used by STEVEN DELLA CAVA (paragraph 18, above); in my opinion JOSEPH DELLA VALLE was conferring with STEVEN DELLA CAVA about the scheduled meeting and transaction.

The relationship between JOSEPH DELLA VALLE and STEVEN DELLA CAVA is also touched upon by the conversation between "Fred" and "Bearsie" detailed in paragraph 10, where "Fred" first asks for "Joey" (JOSEPH DELLA VALLE) and then talks to "Beansie" (STEVEN DELLA CAVA). "Fred" then makes a reference to "that kid Jimmy", which may be a reference to JOSEPH DELLA VALLE by another nickname (see paragraph 5, above), particularly since JOSEPH DELLA VALLE is only approximately 23 years old.

The relationship between JOSEPH DELLA VALLE and STEVEN DELLA CAVA is again demonstrated by the facts detailed in paragraph 15, above. Four times between 8:10 P.M. and 8:28 P.M. on December 23, 1971 (the night DELLA CAVA picked up the packages in the Bronx), JOSEPH DELLA VALLE was seen circling the block, as if to see whether the "coast was clear". After the last circle, he double parked and waved to someone inside the bar; two minutes later, STEVEN DELLA CAVA came out of the bar and drove up to Westchester Avenue to pick up the first package.

This latter sequence indicates that STEVEN DELLA CAVA had contacted JOSEPH DELLA VALLE and had told him to see if anyone appeared to be watching the bar and grill at 2034 Second Avenue, or who appeared to be following JOSEPH DELLA VALLE. JOSEPH DELLA VALLE's wave to someone in the bar indicates that he felt it was safe for STEVEN DELLA CAVA to go to the Bronx to pick up the package without fear of being followed.

27. Based on the above information and observations, there is probable cause to believe that JOSEPH DELLA VALLE and STEVEN DELLA CAVA have been and are continuing to engage in the crimes of criminal possession of a dangerous drug as a felony and criminal sale of a dangerous drug as a felony, in violation of Article 220 of the Penal Law, both of which are crimes punishable by imprisonment of more than one year. There is also probable cause to believe that JOSEPH DELLA VALLE and STEVEN DELLA CAVA are co-conspirators, accomplices and agents in the commission of these crimes. There is also probable cause to believe that conversations of JOSEPH DELLA VALLE and STEVEN DELLA CAVA with each other and with other co-conspirators, accomplices and agents on said telephone at the bar and grill will constitute evidence of said crimes.

28. The type of conversations to be overheard are, specifically, conversations of JOSEPH DELLA VALLE and STEVEN DELLA CAVA with their customers, suppliers, co-conspirators and agents, pertaining to the purchase, sale, transfer, shipment or possession of narcotic drugs.

29. I am not in possession of any information which would indicate that any of the conversations sought to be overheard may be expected to come within any privilege under any applicable rule of law.

30. This investigation has been ongoing since the latter part of September 1971 and for the reasons detailed above and detailed also in paragraph 34 of my affidavit of December 8, 1971, it has been impossible to accumulate sufficient evidence against JOSEPH DELLA VALLE and STEVEN DELLA CAVA through normal investigative procedures to have them prosecuted. It is still impossible to use my confidential informant to gather further evidence and information in these matters. (See paragraph 35 of my affidavit of December 8, 1971.)

31. Under these circumstances, I respectfully request that an order in the annexed form be issued by this Court.

32. The evidence detailed in the above paragraphs indicates that it is impossible to predict what particular time of day the telephone conversations may take place.

It is therefore respectfully requested that the annexed extended and amended eavesdropping warrant be extended and effective for a period of thirty (30) days from the effective date and at any time during the day or night.

33. It is further requested that this order for interception not automatically terminate when the above-described type of communication has been first obtained. Considering the continuing nature of the criminal activity herein, it is important that the interception of conversations not terminate after the first conversation concerning narcotic drugs has been intercepted.

34. To my knowledge, no previous application for the order requested herein has been made to any other court or justice.

George Eaton

George Eaton

Sworn to before me this

21st day of January 1972

Helen Kramer

HELEN KRAMER
Notary Public, State of New York
No. 413-7554205
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires March 30, 1972